Supreme Court, U.S.
FILED

09-515 OCT 10 2009

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2009 CASE NO._____

MICHAEL A. WEISS

Petitioner

Versus

STEVEN SPEER, STEVEN ZWICK, JAMES ALQUIST

Respondents

PETITION FOR WRIT OF CERTIORARI TO APPELLATE COURT OF STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

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A. The questions presented for certiorari review are:

1. If the scope of compass of the U.S. Speech or Petition Clause is not the same as California Civil Code 47(b)(2) (litigation privilege statute), is C.C.P. 425.16(e)(2) (California's anti-SLAPP statute) which has been interpreted to include Civil Code 47(b)(2) to justify striking out Petitioner's 2 causes of action and imposing liability on him, unconstitutional on its face or as applied under the U.S. First Amendment made applicable on California by the Fourteenth Amendment.

2. What are the limits of California's power under the U.S. Constitution First and Fourteenth Amendments to strike causes of action and impose liability under C.C.P. 425.16.

3. Does C.C.P. 425.16 on its face as construed or as applied in the instant case, violate the U.S. First Amendment made applicable on California via the Fourteenth Amendment by imposing a prior restraint on speech because there is no right to amend a cause of action once an anti-SLAPP motion is filed to strike it.

4. Is C.C.P. 425.16(e)(2) over-broad on its face or as applied due to lack of guidelines to prevent infringement of U.S. First Amendment rights of a plaintiff.

5. Are the means and procedures authorized by C.C.P. 425.16 on its face or as applied, to strike out causes of action and impose monetary liability, in violation of the U.S. Fourteenth Due Process Clause because they do not provide sufficient procedural safeguards for U.S. Petition Clause activity by plaintiff's.

6. Did the California Appeals Court unreasonably misconstrue Petitioner's causes of action, evidence, and U.S. Constitutional rights and challenges, when determining that he did not have, nor support, a viable common law cause of action for Malicious Prosecution under C.C.P. 425.16(e)(2); and, hence deny Petitioner his U.S. Petition and Liberty rights, as applied.

7. Was C.C.P. 425.16(e)(2) applied unconstitutionally under U.S. First Amendment because judgment was not supported by sufficient averment, evidence, nor Findings of Fact, that Petitioner's causes of action were a retaliatory sham, objectively and subjectively, speaking in U.S. First Amendment terms.

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B. Petition for Writ of Certiorari

Petitioner Michael A. Weiss respectfully pray that a Writ of Certiorari issue to review the Judgment below. Petitioner demands his U.S. Constitutional 14th Amendment right to sue Respondent Steven Zwick on a single claim for Malicious Prosecution. Petitioner demands his U.S. Constitutional 1st Amendment right to immunity from liability to Zwick, his co-counsel James Alquist, and Steven Speer. Petitioner demands these rights and immunities because C.C.P. 425.16(e)(2) (APP. 51) is unconstitutional on its face under the prior restraint, overbreadth, and clear and present danger doctrines; because C.C.P. 425.16(e)(2) is unconstitutional as applied since there were (a) insufficient procedural guidelines to protect his U.S. 1st and 14th Amendment rights and immunities (b) insufficient averment, evidence and Findings of Fact to support the Conclusion that his causes of action were filed in retaliation against Respondents U.S. Free Speech Clause rights. Petitioner is an attorney with 25 years experience and rated A-V as a preeminent Labor Law attorney by Martindale-Hubbel. While Petitioner represented Speer he billed him at paralegal rates of $125/hour CRUZ, EX REL CRUZ v. ALHAMBRA SCHOOL DISTRICT (601 F.Supp.2d 1183, 1195; CD Cal), yet was sued for shockingly over billing Speer under an Attorney Malpractice lawsuit. That claim was overruled by 3 demurrers; and, Respondents judicially admitted they voluntarily abandoned any further pursuit. If this Court does not authorize Petitioner to sue Zwick for Malicious Prosecution the California State

Courts will not. Petitioner as a U.S. citizen demands his U.S. 14th Amendment right of access to state courts to pursue a common law remedy against Zwick to vindicate the assassination of his reputation as a retaliatory prosecutor and to recover economic and non-economic damages against Zwick for Malicious Prosecution.

D. Opinion Below
California Supreme Court (App.36).
Weiss v. Speer (2009 WL 1497507) (App.36).

E. Basis of Jurisdiction

28 U.S.C. 1257 confers jurisdiction, as the California Supreme Court denied discretionary review on July 8, 2009 of the Court of Appeal Opinion dated May 28, 2009.

The anti-SLAPP statute provides in part that if a defendant makes a threshold showing that the cause of action against him arises from an act in furtherance of his right of U.S. or California Constitution Petition or Free Speech in connection with a public issue and the plaintiff fails to demonstrate a probability of prevailing on his cause of action, then the court must strike the cause of action (§ 425.16, subd. (b)(1)) and award the defendant attorney's fees and costs (§ 425.16, subd. (c)).

The Court of Appeals decided important federal questions in a way that conflicts with relevant Supreme Court decisions by deciding that Petitioner's 2 causes of action against Zwick could be stricken from the case under C.C.P. 425.16 and that no cause of action for Malicious Prosecution

had been averred nor supported; and, imposed monetary liability on him to all Respondents because he retaliated against Respondents U.S. Constitutional 1st Amendment rights on matters of public concern, over claim of his own U.S. Constitutional rights and immunities.

The Court of Appeals decision was a final determination that (I) Petitioner has no right in California courts to pursue a cause of action for Malicious Prosecution against Zwick and (ii) that Zwick and Speer engaged in valid U.S. Constitution Free Speech activity over which Petitioner filed his causes of action. The California Court of Appeals decision is a final determination that Petitioner is liable in money to all Respondents under C.C.P. 425.16(c) despite the fact that neither Speer nor Alquist prevailed. This is Petitioners only opportunity to seek this courts appellate review of the imposition of monetary liability and his U.S. First Amendment rights and immunities and to free the people of California from C.C.P. 425.16(e)(2) which is an unconstitutional statute that not only censors but imposes liability.

Alternatively there is an important question of federal law that has not been, but should be settled by this court as to the limits of California power under C.C.P. 425.16(e)(2) to strike out causes of action and impose monetary liability under the U.S. First Amendment. Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a federal policy that merits application of an exception to the general finality rule. See, e. g., National Socialist Party of America v. Skokie, 432 U.S. 43, 44

(1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 246-247 (1974). Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture [of the state statute in question] could only further harm the operation of a free press."' Tornillo, supra, at 247, n. 6." FORT WAYNE BOOKS, INC. v. INDIANA (489 U.S. 46).

F. Statutes and Rules involved in this case are set out in the Appendix (App.50).

G. Statement of the Case.

[RT means Reporters Transcript on anti-SLAPP Motion (pages 1-17) and Motion to Vacate [anti-SLAPP] Judgment (pages 12-28).
AA means Appellant's Appendix in the state court. AA9 is 7-30-08 Opposition to anti-SLAPP motion beginning at p. 222. AA5 is 9-23-08 Motion to Vacate Judgment beginning with page 20).

The Appendix hereto sets out additional parts of the record where federal issues were raised and decided. (App.67)

1. On 6-1-07 Zwick and his co-counsel James Alquist filed a complaint for Attorney Malpractice, Breach of Fiduciary Duty and Breach of Contract on behalf of Speer, who was Petitioner's prior client. After 3 Orders sustaining Demurrers to said Attorney Malpractice claim (AA #'s 15, 16, 17; AA p. 407, 417, 427), Zwick filed a 3rd Amended Complaint on behalf of Speer for Breach of

Contract and Breach of Fiduciary Duty (AA 18 & AA 9 Ex 1). Weiss then filed his Cross Complaint (AA 9 Ex 2) against Respondents on 5-6-08. Zwick and Alquist, while representing themselves and Speer, demurred to the cross-complaint on 5-30-08. Respondents filed their anti-SLAPP motion on 7-1-08 (AA 9), which was based on retaliatory filing of Petitioner's cross-complaint. ["The Cross Complaint stems from a complaint filed against him by Speer" (AA 9 p. 129:7-8); "The Cross Complaint is essentially a retaliation for the complaint filed by Speer against Weiss" (AA 9 p. 130:5-6); "For the purpose of this motion only section (e)(2) applies" (AA 9 p. 132:5-9); "Cross Complaint....seeks to retaliate against Speer and Zwick for filing a complaint to seek damages against Weiss..." (AA 9 p. 134:7-9); "Speer and Zwick are absolutely privileged to file such an action and no lawsuit short of a Malicious Prosecution may result therefrom" (AA 9 p. 134: 7-12).]

2. Weiss' Opposition to Respondents anti-SLAPP motion attached an amended cross-complaint thereto (AA p. 238:16-18 & AA 9a) [which included a express cause of action for Malicious Prosecution at its para 29]. (App.85)

3. The undisputed evidence at the anti-SLAPP hearing consisted of

(a) The 3 Orders sustaining Demurrers to the Attorney Malpractice lawsuit.

(b) a judicial admission by Zwick at the anti-SLAPP motion hearing that "we voluntarily dismissed the Attorney Malpractice lawsuit and are proceeding only on a Breach of Contract lawsuit" [RT 9:18-21].

(c) Respondents Declarations which established that the only thing provided to 2 unidentified attorneys from whom Zwick solicited an opinion that Weiss over billed Speer were his Invoices. Those Declarations established that the reason the Attorney Malpractice suit was filed was based on the opinion of the 2 unidentified attorneys. (App.67 @ 2(c)).

(d) Speer's statement to Weiss that he had a malpractice attorney who wanted a piece of him. (AA p. 236:3-5).

(e) Docket sheet entries showing that Zwick and Alquist had themselves been sued 7 times for Attorney Malpractice, and that each represented the other at various stages (AA p.252 thru 285).

(f) Zwick had never once physically appeared before the court in this case (AA p. 236:19-21).

(g) Evidence that Speer was excluded from his workplace due to threats to the lives and safety of his supervisors and co-workers; and that Speer instructed Weiss to dismiss all his litigation which he did. Speer sought and received service-connected Long Term Disability benefits from County of Orange in exchange for dismissal of his lawsuits against the County (AA p.245, 240-241; AA 9 p.312).

(h) Weiss lodged 10,000 pieces of paper from Speer's underlying litigation [AA9b p. 312]. His Declaration confirmed his ethics inharmonic with Evidence Code 664 (App.63) presumption that attorneys do not file causes of action with retaliatory intent, and declared that he filed his Cross Complaint because of the sham Attorney

Malpractice lawsuit filed against him. "I am an ethical attorney. Speer's Declaration said Zwick told him the labor attorney said I had been over billed. Such belief was totally insufficient and generated a sham Attorney Malpractice lawsuit against me. Zwick declared he gave those attorneys my billings. He did not give them the goals and strategies of Speer, nor the litigation, witness, evidence nor correspondence files." (AA p. 242:243.)

4. Weiss requested a Statement of Decision [hereafter SOD]. (App.67 @4)

5. Weiss objected to the proposed SOD against him to no avail. (App.68 @5)

6. The California Appeals Court upheld the trial court Conclusion of Law that the immunity provided by Civil Code 47(b)(2) for pre-litigation communications was within the scope of C.C.P. 425.16 which in turn was based upon and interwoven with valid U.S. Constitution Free Speech Clause rights (Ct.App.Opinion 2: para 5). Monetary liability was imposed on Petitioner under C.C.P. 425.16(c). (Ct.App.Opinion last sentence.)

However the scope of the U.S. Free Speech or Petition Clause is not equal to the scope of Civil Code 47(b)(2) and hence C.C.P. 425.16(e)(2) was unconstitutional on its face, and as applied. ["8. Another erroneous conclusion of law was that Zwick engaged in constitutionally protected U.S. Petition Clause activity based on Civil Code 47(b)(2) litigation privilege activity. SOD 2:20-23." (AA p. 41:11-12); "1. The Opposition papers say the sole and exclusive legal basis for the Judgment is the litigation privilege Civil Code 47(b)(2)

(Opposition at 4:4-78); and, that C.C.P. 425.16(e)(2) activity includes Civil Code 47(b)(2) activity. However that is plain error of law because the U.S. Constitution contains the Petition Clause that Zwick relied upon in his anti-SLAPP Motion; yet, the litigation privilege of Civil Code 47(b)(2) is no part of that Clause, now is it? Civil Code 47(b)(2) is a State statute that immunizes tort liability; and it is beyond cavil that a State legislature has no power to delimit the scope of the U.S. Petition Clause by providing a statute immunizing for its violation due to existence of the U.S. Supremacy Clause. State legislatures can immunize tort liability; but, C.C.P. 425.16 focuses on valid U.S. Petition clause activity, not tort activity, now doesn't it? C.C.P. 425.16 is not a tort immunizing statute; rather it is a screen device which denies access to courts for sham Petition Clause filings. It is beyond cavil that the U.S. Petition clause does not immunize defamation per McDonald v. Smith (472 U.S. 479). It is beyond cavil that the U.S. Petition clause does not immunize sham and baseless litigation per BE & K Const. Co. v. National Labor Relations Board (536 U.S. 516). It is beyond cavil that U.S. Petition Clause does not apply to an attorneys pre-advocate conduct per Buckley v. Fitzsimmons (509 U.S. 259)." (AA p. 66:11-28); RT 21:15-19; "The Cross Complaint sought to impose liability on Zwick for his pre litigation communications before he acted as advocate under U.S. Petition Clause and did not function as advocate until he established probable cause." RT 22:20-26; "The Supremacy Clause would prohibit 425.16 or Civil Code 47(b)(2) application because the U.S. Petition Clause does

not include within its compass sham and baseless litigation. The Court: It might be the anti-SLAPP provision might fall within the category of Zwick." RT 24:26 thru 25: 8; "Since U.S. Petition Clause fully occupies its field and does not protect sham and baseless litigation, application of Civil Code 47(b)(2) via C.C.P. 425.16 would severely restrict victims right to sue and gain access to state courts" (Appellants Opening Brief 38: para 1). For further record cites see App.68 @6.

7. The issues of Respondents "valid" exercise of their U.S. Petition/Speech Clause rights and of Petitioner's invalid U.S. Petition Clause & Due Process Clause rights were placed at issue by the moving papers (AA p. 130:7-14) and opposition papers. Petitioner argued that Zwick's U.S. Petition Clause activity was a sham and hence that ["18. Any and all valid statutes or other obligations can be applied to a person claiming Petition Clause immunity, if that defense is a sham. CALIFORNIA MOTOR TRANSPORT CO. v. TRUCKING UNLIMITED (404 U.S. 508, 512-513)" (AA p.230:26-28).] For further record cites see App.69 @7.

8. Petitioner's assertion of his U.S. Constitutional rights and challenges included the following. ["1. Weiss's United States Constitutional right to Petition and seek access to this court cannot be constitutionally terminated by refusing amendment [of pleading]." (AA p. 24:1-4); ["47. The power, strategy and resources of Zwick & Alquist were used solely to harass and deter Weiss in his U.S. Petition Clause right of access to courts including

the right to be heard in a meaningful manner ie without filing and maintaining a sham Attorney Malpractice suit against him for about 1 year until they abandoned it after the court found it unmeritorious due to failure to aver a case within a case facts. Zwick & Alquist diminished the value of Weiss's business by filing the sham malpractice lawsuit. Those injuries were the goal and intent of Speer, Zwick & Alquist." (AA p. 237:13-24); "46. Such representations by Zwick & Alquist were false and made either with malice, intent to avoid the truth of the matters, with reckless or conscious indifference to the rights of Weiss to the liberty and property rights of Weiss under the U.S. Due Process Clause or his right of access to courts under the U.S. Petition Clause made applicable upon the States by the Fourteenth Amendment Due Process Clause." (AA p. 237:6-12); "22. To enforce sham/baseless Petition Clause activity of Speer, Zwick & Alquist in disregard of the constitutional, statutory, and common law, rights of Weiss would be arbitrary in itself and result in violation of the substantive component of the U.S. Due Process Clause." (AA p. 231:18-23); "29. Further discovery is necessary for the parties and court to resolve the Anti-SLAPP Motion. It would be a violation of the U.S. Due Process Clause to require Weiss to prove the illegal/invalid exercise of Petition Clause by Speer, Zwick & Alquist, within such short time as C.C.P. 425.16 allows." (AA p. 233:22-25); "10. The anti-SLAPP motion and trial thereon (see 8-19-08 RT 11:12-13) focused solely on the litigation privilege and the United States Petition Clause. In turn the opposition to the anti-SLAPP motion focused

likewise on the litigation privilege and United States Petition Clause." (AA p. 41:23 thru p.42: 1); "The Cross-Complaint complained about the Attorney Malpractice lawsuit; whereas, the Judgment inconsistently said it concerned the Breach of Contract lawsuit." (AA p. 37: 11-15); "Weiss' rights under the Fourteenth Amendment Due Process Clause encompasses C.C.P. 1005.5, C.C.P. 592 and C.C.P. 170." (AA 36:26-28); "I contend Zwick has not engaged in constitutionally protected activity. It has got to be addressed." (RT 11:21-26); "Zwick did not engage in valid exercise of Petition Clause activity. If it is not valid, my right of access to court, my right to Petition this court under the U.S. Constitution is being infringed upon." (RT 24:21-25). "The issue of valid U.S. First Amendment activity had to be decided under the anti-SLAPP motion (Appellants Opening Brief 18: para 1).

9. C.C.P. 425.16(a) in connection with the facts in our case, presented the issue of valid exercise of U.S. Constitution rights by Zwick and the invalid exercise by Petitioner as in the REINER case. "The Supreme Court of Ohio here held that a witness who denies all culpability does not have a valid Fifth Amendment privilege against self-incrimination. The decision at issue "fairly appears...to be interwoven with the federal law," and no adequate and independent state ground is clear from the face of the opinion. Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983)." OHIO v. REINER (532 U.S. 17).

10. Petitioner contended C.C.P. 425.16 was

unconstitutional under U.S. First Amendment clear and present danger doctrine because C.C.P. 425.16 prohibited amending a cause of action once the motion was filed. ["10. Any California Court SLAPP Order issued in this case would be unconstitutional, as applied, without a finding that there is a clear and present danger that valid Petition Clause activity by Speer, Zwick & Alquist will be infringed upon by the mere filing of Weiss's Cross Complaint upon them. This court must make that determination based upon review of the entire record. THOMAS v. COLLINS (323 U.S. 516, 530)" (AA 9a p.228: para 10.); 'The true test under C.C.P. 425.16, consistent with federal Constitutional law, should be to determine whether there is clear and present danger of objectively groundless litigation brought with corrupt subjective intent per BE & K Const. Co. v. National Labor Relations Board (536 U.S. 516); THOMAS v. COLLINS (323 U.S. 516, 536); Jenkins v. McKeithen (395 U.S. 411, 421); O'Shea v. Littleton (414 U.S. 488); Douglas v. City of Jeannette (319 U.S. 157); CALIFORNIA v. LATIMER (305 U.S. 255); Massachusetts State Grange v. Benton (272 U.S. 525); Parker v. Winnipiseogee Lake Cotton & Woolen Co. (67 U.S. 545); and City of Los Angeles v. Lyons (461 U.S. 95). If the pleading can be amended there is no clear and present danger". (App Reply Brief 20: para 2). 'THE UNITED STATES SUPREME COURT HAS ALREADY DEFINED WHEN SPEECH CAN BE PROHIBITED. PETITION ACTIVITIES IS JUST ONE FORM OF SPEECH. UNLESS EACH RAISES TO THE LEVEL OF A CLEAR AND PRESENT DANGER OF IMMINENT DANGER, NO COURT IN THIS COUNTRY CAN STOP IT. YOU CAN'T

STOP THE PENTAGON PAPERS FROM BEING PUBLISHED WHICH EXPOSE CLASSIFIED INFORMATION, YOU CAN'T STOP ANY SPEECH UNLESS – THE COURT: ANTI-SLAPP DOESN'T STOP ANYONE FROM SAYING ANYTHING, SIR. IT MERELY PROVIDES A PROCEDURE TO QUICKLY DETERMINE WHETHER A PARTICULAR CAUSE OF ACTION HAS MERIT. (App. Oral Arg. RT 4).

11. The California Appeals court held that C.C.P. 425.16 provides no right to amend a cause of action to avoid a anti-SLAPP motion (Opinion 5: through 6: para 10) as did the trial court (RT 5:25-26) despite Petitioner's challenge that such would be a prior restraint. ["The automatic per se prohibition against amendment is a form of prior restraint to Free Speech and hence violates the U.S. Free Speech Clause" (Appellant's Opening Brief p.25); "C.C.P. 425.16 per se prohibits amendments. Such is an unconstitutional and insufficient State ground of decision when U.S. Petition Clause rights are at issue" (Appellants Opening Brief 21); "because C.C.P. 425.16 operates on U.S. Petition Clause rights of appellant it must pass the strict scrutiny test and it failed because the means are not narrowly tailored to the goal due to its per se automatic prohibition against amending pleadings" (Appellants Opening Brief 23: last sentence.)

12. Petitioner contended C.C.P. 425.16(e)(2) is over-broad in its definition of U.S. Free Speech and Petition activity. ["C.C.P. 425.16 is unconstitutionally over-broad on its face under U.S. Free Speech

Clause since it regulates Free Speech is a substantial number of cases. It sets up a net so large as to catch the innocent along with the guilty, see TERRY v. ANDERSON (95 U.S. 628)" (Appellants Opening Brief p. 24); "Because of the word "any" in C.C.P. 425.16(b)(1) and (e)(1)(2)(3)(4) this statute is unconstitutional under U.S. Constitution because it is over-broad under its free Speech Clause, see BOARD OF AIRPORT COMMISSIONERS OF the CITY OF LOS ANGELES v. JEWS FOR JESUS, INC. (482 U.S. 569)" (Appellant's Reply Brief 15: para 1)]. Petitioner likewise contended that the C.C.P. 425.16(e)(2) definition of public interest suffers from the overbreadth due again to use of the words "includes any." ["A persons rights under U.S. Petition/Speech Clause is not to be delimited by the California legislature. The word "any" is over-broad see TYSON & BRO.-UNITED THEATER TICKET OFFICES v. BANTON (273 U.S. 418)" (Appellants Reply Brief 15: para 1)]. ["12. The Petition Clause rights of Speer, Zwick & Alquist cannot be used to infringe upon the right of Weiss under any valid state/federal law. LINCOLN FEDERAL LABOR UNION v. NORTHWESTERN I. & M. CO. (335 U.S. 525, 531)" (AA p. 229:10-12); "Weiss has a U.S. Due Process liberty and property interest in pursuing his Cross-Complaint. UNITED STATES v. KRAS (409 U.S. 434, 88)" (AA p. 230:26-28).] Gertz v. Robert Welch, Inc. (418 U.S. 323, 346) noted that the "public interest" test or standard is one not within the competence of Judges, as it would require them to decide on an ad hoc basis which lawsuits address issues of public interest and which do not; and, in essence require then to decide in

the words of Mr Justice Marshall "what information is relevant to self government."

13. Petitioner was censored under C.C.P. 425.16(e)(2), a statute so generalized as to be, in the words of the California Appeals Court not susceptible of exact definition; but, instead "applicable to conduct that relates to litigation... Courts have adopted a fairly expansive view of what constitutes litigation-related activity within the scope of C.C.P. 425.16 including ... communications within the litigation privilege of Civil Code 47(b)(2)." (Ct.App.Opinion 2: para 5). C.C.P. 425.16(e)(2) thus blankets with uncertainty whatever may be plead due to its use of the words "includes any." A sharp line cannot be drawn surely or securely. The effort to observe it could not be Free Speech in any sense of free advocacy of principle or cause. In BOARD OF AIRPORT COMMISSIONERS OF the CITY OF LOS ANGELES v. JEWS FOR JESUS, INC. (482 U.S. 569) the proffered saving construction of an ordinance was to limit regulation of speech to "airport related" speech or conduct. This court said such determinations could not safely be made due to the fact that no guiding standards had been simultaneously proffered. The result would leave First Amendment activities infringed upon until a multitude of judicial adjudications could be made as in Baggett v. Bullitt (377 U.S. 360, 378). The same now must be concluded as to C.C.P. 425.16(e)(2) overbreadth.

14. City of Houston, Tex. v. Hill (482 U.S. 451, 462, fn 11, & 468) and Cohen v. California (403 U.S. 15, 22)

held that the word "any" in an ordinance or statute regulating speech was per se over-broad; and, that since the plain English meaning of the word "any" is not ambiguous, it would be unnecessary for any court to interpret it. (Hill, supra p.465).

15. Petitioner contended that his Fourteenth Amendment Due Process Clause rights were violated. ["3. The contention of Speer, Zwick & Alquist in their Anti-SLAPP Motion that Weiss's Cross-Complaint was filed seeking to impose liability upon them for their Petition Clause activity is grounded on nothing but speculation and conjecture which this court cannot rubber stamp." (AA p. P. 225:16-19); "4. The burden of Speer, Zwick & Alquist under the 1st prong of the Anti-SLAPP statute of C.C.P. 425.16 required them to show and establish that the nature of the Cross-Complaint included averments seeking to impose liability upon them because of the filing of the Speer's original 1st, 2nd or 3rd Amended Complaints. They have not met their burden." (AA p. 225:20-24); "6. Armstrong v. Manzo (380 U.S. 545, 551-552) held that Due Process requires an opportunity to be heard at a meaningful time and in a meaningful manner. RT 13:19-23. [B]urden never became applicable if Zwick did not make the threshold showing that the cross-complaint sought to impose liability upon him because of his U.S. Petition Clause activity. " (AA p. 47: 1-6); "29. GREAT SOUTHERN FIRE PROOF HOTEL CO. v. JONES (177 U.S. 449, 453) and Steel Co. v. Citizens for a Better Environment (523 U.S. 83, 94) both held that standing must be asked without respect to the

relation of the parties. Standing to complain about any issue requires (1) actual or threatened injury (2) causation and (3) redressability. Weiss had standing to complain about Zwick's conflict of interest because he contended he probably would not get a fair trial/settlement since Zwick represents not only himself but also Speer and Alquist as well; and, because he manifested actual hostility and malice against Weiss by his own words and tortuous course of pre-litigation conduct." (AA p. 49:20 thru p. 50: 6); "30. In our case the threatened injury involves Weiss's constitutional and statutory right to a fair trial or fair settlement pre-trial." (AA p. 50:10-12); "10. [A]n adjudicatory act involves the actual application of a rule of law to a specific set of existing facts. In our case the SOD fails to explain those specific facts about C.C.P. 425.16(e)(2). More particularly what in the world were those words "of communication" spoken from Zwick to Speer that were protected by the litigation privilege; and, when, in terms of date, were they uttered. Without such a factual explanation it was impossible to attempt to apply the correct rule of law such as the U.S. Petition Clause. No doubt the reason the SOD failed to provide a specific set of applicable facts and law stems from the fact that Zwick's anti-SLAPP motion failed to contain them; opting instead for a ipse dixit conclusory approach that everything he said, and did, was immunized by the litigation privilege of Civil Code 47(b)(2). No judicial officer has rubber stamp power; rather its has an affirmative duty to exercise non-delegable discretion." (AA p. 69: 22 thru p. 70: 10); "18. A

SLAPP Order requires a finding of fact and conclusion of law that Zwick engaged in valid U.S. Petition Clause activity and that Weiss did not, and could not, prove up the opposite either as a matter of law or as a matter of probability." (AA p. 72:24: thru p. 73: 5); "6. [B]ecause the Legislature codified provisions, like C.C.P. 592 and C.C.P. 1005.5, applicable to "all" causes of action for breach of contract and personal injury, it necessarily abrogated contrary case law and precluded the state courts from establishing a different rule because Civil Code 4 and C.C.P. 4 says the code (not judges) establish the law of this state. Hence Judge Moberly had no authority to determine the anti-SLAPP motion before the Demurrer. Such was prejudicial and caused a miscarriage of justice as stated in the moving papers. 7. [S]tate legislatures may by statute regulate the mode and manner by which the Judicial Branch courts shall exercise their given constitutional jurisdiction. Weiss contends they did so in C.C.P. 592 and C.C.P. 1005.5." (AA p. 68:8-27); "11. C.C.P. 590 and C.C.P. 1005.5 and hence also the U.S. Due Process Clauses, placed a limitation on Judge Moberly's power, authority and jurisdiction. By acting ultra vires those prescriptions she acted in excess of her jurisdiction. The instant Motion to Vacate Judgment address the exercise of this courts jurisdiction in terms of statutory and Constitutional Clause violation. The exercise of judicial jurisdiction, power, and authority, is a constitutional mile apart from the existence of such jurisdiction, power, and authority. In sync, the valid exercise by Zwick of rights under U.S. Petition

Clause is a statutory mile apart from the existence of such right. Likewise the application of the litigation privilege is a statutory mile apart from its existence. Zwick's Opposition papers just repeat what his anti-SLAPP motion papers said; they completely fail to address any point or authority contended for in the moving papers; and hence the result is an implied concession that no opposition exists, now isn't it? Weiss demands his Constitutional right to sue Zwick for malicious prosecution." (AA p. 70:14-28). ["Albright v. Oliver (510 U.S. 266, 292 thru 294; 298 thru 300 & 314 thru 316) is cited for the proposition regarding the shockingly inadequate procedure under C.C.P. 425.16 - the right to Petition is not adequately protected" (Appellant's Opening Brief 32: para 1)]. For further record cites see App.71 @ 14.

16. "The state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of "federal law" in the process. It is not surprising that this Court has become more interested in the application and development of federal law by state courts in the light of the recent significant expansion of federally created standards that we have imposed on the States." Michigan v. Long (463 U.S. 1032).

17. C.C.P. 425.16 as interpreted not only re-defined the scope of U.S. Free Speech by saying it includes anything within Civil Code 47(b)(2); but, unconstitutionally put the burden of proof on Petitioner to prove respondent did not engage in valid U.S. Constitution Free Speech Clause activity

by evidence which conclusively established that Respondent's speech was illegal as a matter or law or by getting a concession to that effect (Appeals Opinion 4: para 3.) This is contrary to Speiser v. Randall (375 U.S. 513, 525) and other retaliatory prosecution cases from this Court, which require defendant to carry the burden of proving he engaged in valid U.S. First Amendment activity before Plaintiff has to prove anything.

18. The California Appeals court determined that because the copy of the amended Cross-Complaint in the appendix did not show a file stamp on it, such could not be the operative document (Ct.App.Opinion at 6: para 1); but, C.R.C. 8.124 (App.65) did not require a file stamp on it; and, C.R.C. 8.163 (App.65) contained a presumption that the record on appeal contains all documents necessary to a determination of the Appeal. Hence the California Appeals Court had no adequate and independent reason to support such determination. The California Appeals Court opinion said that "an anti-SLAPP motion does not deal with the adequacy of the pleadings...and therefore an amended pleading was irrelevant" (Ct.App.Opinion 5: last para). Petitioner's amended cross-complaint as to its Malicious Prosecution cause of action (App. 85) was quite relevant as it is the only cause of action that Civil Code 47(b)(2) provides no immunity against per Silberg v. Anderson (50 Cal.3d 205, 212 (1990).

19. The Appeals Court determination that "because Zwick met his burden to show the

communications fell within the protection of the statute" (Ct.App.Opinion 4: para 5) is unintelligible in First Amendment terms.

20. Zwick's anti-SLAPP motion did not factually plead and prove Petitioner retaliated solely to deter public discussion on a specific issue of public concern, nor could it, per Time, Inc. v. Firestone (424 U.S. 448, 454); but, simply relied on the C.C.P. 425.16(e)(2) definition regarding same; however, C.C.P. 425.16(e)(2) use of the words "includes any" are unintelligible in First Amendment terms. Despite quoting C.C.P. 425.16(e) which provided that "as used in this section act in furtherance of a persons right of Free Speech under the U.S. or California Constitution in connection with a public issue includes... (2) any written or oral statement or writing made in connection with an issue under consideration or review by a judicial body," the California Appeals Court said it applied to pre-filing oral statements made before any issue was under consideration by a judicial body (Ct.App.Opinion 2: para 5). It then cited a case to support the granting of an anti-SLAPP motion because in that case there were communications relating to a "pending action" (Ct.App.Opinion 3: para 2). Note also Ct.App.Opinion 2: para 3 Introduction, inconsistently referred to a cause of action arising from "a constitutionally protected right" and a cause of action arising from "a protected activity" the latter of which does not require any showing that such was a valid exercise of U.S. Constitution Free Speech or Petition Clause rights. Note further its reasons for not permitting

amending in anti-SLAPP Motions - "vexatious ... artificial pleading ... and inevitably another request for leave to amend." (Ct.App.Opinion 5: para 2).

21. This Petition involves a continuing litigation abuse by Zwick involving 10 months time during which 3 Demurrers were sustained to the Attorney Malpractice Complaint he and Alquist initiated and maintained. Zwick at the anti-SLAPP hearing made the judicial admission that the only claim Respondents would be pursuing would be for Breach of Contract. Thus, we are not dealing with one discrete act by Respondent (ie. pre-litigation communication between Zwick and Speer) and one discrete (possibly retaliatory) act by Petitioner, the purpose of which is in question as the California Court of Appeals unreasonably determined.

22. Despite invoking C.C.P. 634 (Appellant's Opening Brief 20: para 1) the California Court of Appeal noted that the trial court Statement of Decision made 3 Findings of Fact: (1) In February 2007 Speer was referred to Zwick from a local bar association (2) Zwick filed a 3rd Amended Complaint on behalf of Speer for Breach of Contract and Fiduciary Duty against Petitioner and (3) on 5-9-08 Weiss filed a cross-complaint against Zwick. The Appeals Court also noted that the Statement of Decision made 1 Legal Basis for Decision: Zwick established that the communications between him and Speer are protected by Civil Code 47(b)(2) and by the anti-SLAPP statute. (Court of Appeals Opinion 2: para 1.) However these 3 Findings of Fact do not,

and cannot, support the Conclusion of Law on retaliation. Furthermore such legal conclusion switched the ground of the anti-SLAPP Motion from retaliation by Weiss due to the filing of Speer's 3rd Amended Complaint to retaliation against U.S. Free Speech Clause activity between Zwick and Speer. Furthermore under either ground there had to be a Finding of Fact showing "but for" retaliatory intent by Petitioner which caused Respondents harm; yet, there were no such Finding of Fact.

23. Petitioner argued that the evidence concerning the communications between Zwick and the unidentified labor attorney, as well as, the initiation and maintenance of a sham Attorney Malpractice lawsuit, established invalid U.S. Petition clause activity. ["No protection under U.S. Petition clause regarding manufacture of evidence; nor, filing an action for Attorney Malpractice grounded on such evidence...it is beyond cavil that the U.S. Free Speech does not protect sham and baseless lawsuits" (Petitioner's Opening Appeal Brief p 26: para 2 citing RT 7:1-6); "Zwick aided and abetted the manufactured opinion since he supplied the materials for its formation. Zwick could not function as advocate before he had probable cause" (Petitioner's Opening Appeal Brief 35: para 2); "No attorney could seriously believe an Attorney Malpractice proceeding could be grounded on invoices alone, since invoices do not prove up a case within a case" (RT 8:9-26); "Zwick sought to achieve extraneous objects ie use of the legal system as a economic weapon through sham, baseless and unauthorized lawsuits to make

defendant pay legal costs; or, solely for his own personal animosity to get a piece of Weiss" (Appellants Opening Brief 39: last 2 sentences); "The cross-complaint was sufficient to hold Speer and Alquist liable for aiding and abetting the manufacture of evidence" (Appellants Opening Brief 40: para 3)]. Petitioner supported his position under the reasoning in Buckley v. Fitzsimmons, 509 U.S. 259, 274-276) (no absolute immunity when prosecutor acts in administrative capacity); but, the California Appeals Court deemed Fitzsimmons "inapt" (Ct.App.Opinion 4: para 4) because it was decided in the context of a 42 U.S.C. 1983 case.

24. The California Appeals Court unreasonably interpreted Petitioner's Cross-Complaint, and evidence, by determining that "although the cause of action are labeled Interference With Economic Relations or alternatively Interference With Contract, and Fraud, they are based on communications between Speer and Zwick." (Ct.App.Opinion 3: para 1). "We look to the gravamen of the cause of action which here involves communications between a lawyer and a client." (Ct.App.Opinion 4: para 3). "As discussed above communications between Zwick and Speer were made in contemplation of litigation...The cause of action against Zwick for Interference With Contract and Fraud, not manufacture of evidence, as Weiss asserts... nor Malpractice." (Ct.App.Opinion 4: last para and 5: para 1.)

25. Petitioner extensively cited California's gravamen law. ["A Complaint as a pleading need

not proffer any theory of liability whatsoever. County of Santa Clara v. Hayes Co. (43 Cal.2d 615, 619)" (Appellants Opening Brief p. 27: para 3); "Jones v Steamship Cortes (17 Cal. 487, 497-498) held that [E]very action under our practice may be termed an action on the case; and, hence any ground of relief which can be regarded as part of the case may be included. Today C.C.P. 425.10(a) requires but a statement of the facts constituting some cause of action and a demand for a judgment that the pleader thinks himself entitled to...Everything else is surplusage." (Appellants Opening Brief 28: para 1)].

26. The Court of Appeals misinterpreted California's gravamen and primary right pleading rules because even the Cross-Complaint contained averments of Malicious Prosecution. [("Zwick acted outside the role of an attorney and then brought Malpractice suit" (AA 9 Ex 2: para 4); "Zwick's frivolous and sham malpractice suit caused Weiss damages" (paras 5 & 6); "Zwick made false representations that Weiss grossly over billed and then brought suit for malpractice" (para 7); "Zwick's false inducements resulted in suit for malpractice against Weiss" (para 10)]. There was no dispute by Respondents that the amended cross complaint contained a viable Malicious Prosecution claim.

27. Petitioner makes a U.S. Fourteenth Amendment Due Process Clause cumulative impact challenge as in CHAMBERS v. State of MISSISSIPPI (410 U.S. 284). Petitioner complained that every C.C.P. and C.R.C. rule was ignored during anti-SLAPP

proceeding, which statutes and rules made up the content of his Due Process rights per Vitek v. Jones (445 U.S. 480). C.C.P. 901 provided that an Order may be reviewed on appeal as prescribed in this Title and that the Judicial Counsel may prescribe rules for the practice and procedure on Appeal. In our case the Appeals court did not comply with CRC rules on Appeal even cut off Petitioner during oral argument (Ct.App. RT 18:6-18) despite being instructed by California Supreme Court not do that that in People v. Pena (32 Cal.4th 389 (2004). Trial Court ignored C.C.P. 475, C.C.P. 580, C.C.P. 452, C.C.P. 431.10 (Appellants Opening Brief 42: para 1-3); trial court ignored Civil Code 1472 (Appellant's Opening Brief 61); trial court ignored C.C.P. 589(b)(c); and C.C.P. 592, C.C.P. 4, C.C.P. 1858 (Appellants Opening Brief 62: para 1, 2). Furthermore the California Appeals Court Statement of Facts (Ct.App.Opinion 1: para 5) includes facts not found by the trial court; and, under C.C.P. 909 (App.62) and C.C.P. 592 (App.59) the Court of Appeals had no authority nor power to make Findings of Fact on its own.

28. The California Appeals Court unreasonably interpreted Petitioner's U.S. Constitutional challenges when it said "Weiss makes several constitutional challenges...that the prohibition against amendment 'after a motion is granted' violated rights to Free Speech petition, due process, equal protection, and unreasonable seizure is an excessive penalty, or works a forfeiture." (Ct.App.Opinion 6: para 4). This was unreasonable interpretation because those

constitutional challenges were raised 'before the anti-SLAPP motion was granted' as above specified.

H. Argument Amplifying Reasons Why Writ Should be Granted

29. Lanzetta v. State of New Jersey (306 U.S. 451, 453) and United States v. Reese (92 U.S. 214, 221) are cited the for proposition that if C.C.P. 425.16(e)(2) is repugnant to the U.S. Constitution First Amendment on its face, then specification by respondents of details of the act/omission intended to be charged as an invalid exercise of U.S. Constitution Petition Clause activity by Petitioner, would not serve to validate the statute. Instead it is the statute and not the anti-SLAPP motion or evidence proffered, that is constitutionally defective. If California's C.C.P. 425.16(e)(2) is constitutional, other States will follow.

30. In our case it was Zwick who admitted at the hearing on the anti-SLAPP Motion that Respondents would no longer pursue the Attorney Malpractice claim against Petitioner; and, would only pursue a Breach of Contract action. That judicial admission followed the 3 judicial warnings in the form of 3 Orders sustaining Demurrers to that sham and baseless Attorney Malpractice claim. As in the Wayte case, it was Respondents who selected themselves for a cause of action based on Malicious Prosecution. "Indeed, those prosecuted in effect selected themselves for prosecution by refusing to register after being reported and warned by the Government." WAYTE

v. UNITED STATES (470 U.S. 598).

31. Petitioner contends as in the NLRB cases cited below that his rights under the U.S. Constitution Petition Clause have been violated by the California Court of Appeals determination Petitioner retaliated against respondents U.S. Free Speech Clause rights and hence must be censored and that monetary liability exists since there were genuine issues (1) whether he had a cause of action for Malicious Prosecution (2) whether he had probable cause when he decided to file it (3) whether he had, at the time of filing, a "but for" subjective retaliatory intent, which in turn was (4) the "but for" cause of constitutional harm to Zwick's U.S. Constitution Free Speech Clause rights. "The right to litigate is an important one, and the Board should consider the evidence with utmost care before ordering the cessation of a state-court lawsuit. [I]f there is a genuine issue of material fact that turns on the proper inferences to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined." Bill Johnson's Restaurants, Inc. v. National Labor Relations Board (461 U.S. 731). "Although Petitioner sought review of the fee issue, we did not grant certiorari on that specific question, instead asking the parties to address whether the Board may impose liability. As we see it, a threshold question here is whether the Board may declare that an unsuccessful retaliatory lawsuit [536 U.S. 530] violates the NLRA even if reasonably based. If it may, the resulting finding of illegality is a burden by itself. [T]he finding also

poses the threat of reputational harm that is different and additional to any burden posed by other penalties, such as a fee award. [W]e can resolve this case by looking at the finding of illegality." BE & K Const. Co. v. National Labor Relations Board (536 U.S. 516).

(I.) CLEAR AND PRESENT DANGER BALANCING REQUIRED UNDER C.C.P. 425.16

32. In our case the California Legislature declared in C.C.P. 425.16(a) that SLAPP suits are not in the public interest. The California legislature did not declare that the disturbing increase in SLAPP suits presents a clear and present danger to the fair administration of justice in California courts nor to defendants as a class of litigants. However it is beyond cavil that a "disturbing increase" in lawsuits brought primarily to chill the valid exercise of constitutional rights of speech and petition is not a sufficient impact to authorize censor of U.S. First Amendment activity. Coates v. City of Cincinnati (402 U.S. 611, 615); STREET v. NEW YORK (89 S.Ct. 1354, 1365); Schneider v. State of New Jersey, Town of Irvington (60 S.Ct. 146, 150-151); COX v. STATE OF LOUISIANA (379 U.S. 536, 551-553); Cantwell v. State of Connecticut (310 U.S. 296, 311; 84 L.Ed. 1213); and Edwards v. South Carolina (372 U.S. 229, 238).

33. In our case there were other means which would likely mitigate the purported imminent evil such as authorizing an amended cause of action if reasonably viable; or, striking out discrete paragraphs or sentences from other causes of action in order to preserve a single viable

Malicious Prosecution cause of action.

(ii.) C.C.P. 425.16 STANDARDS ARE INCONSISTENT WITH THIS COURTS RETALIATORY PROSECUTION STANDARDS

34. C.C.P. 425.16(b)(1) addresses the issues of (1) "any act in furtherance" by Respondents and (2) "probability of prevailing" on the cause of action by petitioner. The 2 prong test under C.C.P. 425.16(e)(2) is far removed from traditional Retaliatory Prosecution standards developed by this Court under the First Amendment which require: (1) proof by defendant that he engaged in a valid exercise of his U.S. Constitution First Amendment rights (2) proof by defendant that plaintiff, a State actor [unlike Petitioner], responded to such exercise by filing a civil complaint without probable cause and with retaliatory motive to deter public comment on a specific issue of public concern; and (3) proof by defendant [sufficient for Finding of Fact if unrebutted by plaintiff or applicable presumption of state or federal law] that such retaliatory motive and lack of probable cause was the "but for" cause of injury to defendant's U.S. First Amendment rights.

35. "[W]e have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution. See Crawford-El, supra, at 593; Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 283-284. [T]here is a longstanding presumption of regularity accorded to prosecutorial decision making. See Reno v. American-Arab

Anti-Discrimination Comm., 525 U.S. 471, 489-490; United States v. Armstrong, 517 U.S. 456, 464-466." Hartman v. Moore (547 U.S. 250).

36. Although the Moore case addressed Retaliatory Prosecution in the context of a tort action, ASHCROFT v. IQBAL (129 S.Ct. 1937), Dunlop v. Bachowski (421 U.S. 560, 574) and other cases from this Court addressed it in much the same manner in the context of a motion to dismiss. But C.C.P. 425.16(c) imposes liability in addition to censorship and hence goes beyond a mere motion to dismiss. Furthermore C.C.P. 425.16 removed Petitioner's common law and Civil Code 47(b)(2) immunity concerning his decision to file a Cross-Complaint; and a SLAPP Order subjected him to further liability under C.C.P. 425.18 (APP.56). A requirement of lack of probable cause should be extended to C.C.P. 425.16 motions.

37. 'The [trial] court did not make an express finding as to whether the same decision would have been made, but on this record the [respondents] do not, and seriously cannot, argue that the same decision would have been made without regard to the 'demands.' And while the District Court found that Petitioner's "criticism" was the "primary" reason for the School District's failure to rehire her, it did not find that she would have been rehired "but for" her criticism." Givhan v. Western Line Consolidated School District (439 U.S. 410).

38. As Givhan notes, "primary" intent is not "but for"

intent; and, hence C.C.P. 425.16(a) burdens more speech than necessary. In our case Respondent's did not, and seriously cannot, argue that Petitioner would have made the same decision to file his cause of action without regard to the pre filing communications between Zwick and Speer. Respondents immunity from liability is a matter different from that of Petitioners intent, let alone, his sole intent to retaliate on a specific matter of public concern. Respondents did not, and seriously cannot, argue that the communications between Zwick and Speer addressed a specific matter of public importance in U.S. First Amendment terms. Zwick is not concerned with any possible prematurity of a Malicious Prosecution claim since he judicially admitted that Respondents are no longer pursuing any Attorney Malpractice claim and desire a single trial on any Malicious Prosecution claim by Petitioner per Loomis v. Murphy (217 Cal.App.3d 589 (1990) and Munson v. Linnick (63 Cal.Rptr. 340; 255 Cal.App.2d 589 (1967).

(iii). C.C.P. 425.16 IS MISSING PROCEDURAL DUE PROCESS SAFEGUARDS & GUIDELINES TO PROTECT 1ST AMENDMENT RIGHTS

39. The California Legislature in C.C.P. 425.17(a) (App.54) itself found and declared that a disturbing number of abusive C.C.P. 425.16 motions has undermined the valid exercise of U.S. Petition and Free Speech Clause rights.

40. C.C.P. 425.16 expressed the California

Legislature's concern that it is better to prevent the publication before a clear and present danger exists; and, to punish the offender at the same time. It prevented the publication by striking it out of the court record; and, punished the speaker to deter him by imposing monetary liability upon him. "In Entick v. Carrington, 19 How.St.Tr. 1029, 1073 Lord Camden expressly dismissed the contention that such a warrant could be justified on the grounds that it was better to prevent the publication before than to punish the offender afterwards.' Roth v. United States recognized the complexity of the test of obscenity fashioned in that case and the vital necessity in its application of safeguards to prevent denial of 'the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.' Id., 354 U.S. at page 488. (T)he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. * * * The separation of legitimate from illegitimate speech calls for * * * sensitive tools * * *.' It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity." Marcus v. Search Warrant of Property (367 U.S. 717).

41. "Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. Kingsley Books, Inc., v. Brown, supra. The vice of the present

procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding -- inherent in all litigation – will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. It can only result in a deterrence of speech which the Constitution makes free. "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." Bailey v. Alabama, 219 U.S. 219, 239. The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech. [P]rocedures which place the burdens of proof and persuasion on the taxpayer is a violation of due process." SPEISER v. RANDALL (357 U.S. 513).

42. In U.S. First Amendment terms. C.C.P. 425.16 contains an unconstitutional prior restraint, burden of proof, burden shifting mechanism, quantum of proof, time table, and determination requirement as to facts and law.

IV. NO ADEQUATE AND INDEPENDENT STATE GROUND OF DECISION

43. The appeals opinion stated Petitioner fails to make reasoned legal argument or cite any

authority that shows or even suggests C.C.P. 425.16 conflicts with [US Constitutional] provisions. As a result those claims are forfeited." (Ct.App.Opinion 6: para 4). However, there is no C.R.C. which calls for forfeiture due to failure to make reasoned legal argument; quite to the contrary all rules must be construed liberally to secure justice per C.R.C. 1.2, 1.5 and 8.7 (App.64); appeals courts must take judicial notice of the U.S. Constitution and this courts case law regarding same per Evidence Code 451 (App.63); and, they have no power to make up rules per C.R.C. 1.3, 8.7, and 8.20 (App.64).

CONCLUSION

Petitioner pray that this Court grant a writ of certiorari to allow full appeal; or, for other relief as it deems proper such as a Per Curiam declaring C.C.P. 425.16 unconstitutional on its face or as applied, authorizing Petitioner to sue Zwick for Malicious Prosecution and to vacate the imposition of monetary liability to Respondents.

October 5, 2009
RESPECTFULLY SUBMITTED
Michael A. Weiss, Attorney for Petitioner

I. APPENDIX

(I)(I) The following is the California Court of Appeals Opinion sought to be reviewed in this Writ Petition.

Court of Appeal, Fourth Appellate District, Division Three-No. G041139

S173936 Filed Jul-8, 2009 Frederick K. Ohlrich Clerk Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

Michael A. Weiss, Cross-Complainant and Appellant,

v.

Steven Speer et al., Cross-defendants and Respondents.

The application for stay and petition for review are denied.

George

Chief Justice

WEISS v. SPEER, et al. (2009 WL 1497507 (Cal.App. 4 Dist.))

Not Reported in Cal.Rptr.3d, 2009 WL 1497507 (Cal.App. 4 Dist.)

Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fourth District, Division 3, California.

No. G041139.

(Super.Ct.No. 07CC06466).

May 28, 2009.

Appeal from an order of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Affirmed. Document citing additional authority stricken.

Michael A. Weiss, in pro. per., for Cross-complainant and Appellant.

Steven Zwick for Cross-defendant and Respondent Steven Speer.

James Alquist for Cross-defendants and Respondents Steven Zwick and James Alquist.

OPINION: RYLAARSDAM, Acting P.J.

*PAGE 1 Cross-complainant and appellant Michael A. Weiss appeals from an order granting a motion to strike two causes of action in his cross-complaint against cross-defendant and respondent Steven Zwick under Code of Civil Procedure section 425.16 (section 425.16; anti-SLAPP motion; all further statutory references are to this code unless otherwise stated). He claims Zwick's statements do not fall within the protections of the anti-SLAPP statute and that he has shown a probability of prevailing on his claims. He also challenges the statute on constitutional grounds.

Additionally Weiss contends the court erred in hearing the demurrer of cross-defendants and respondents Steven Speer and James Alquist to his cross-complaint after it granted the anti-SLAPP motion, claiming the demurrer should have been heard first. Finally, he appeals from the denial of his motion to disqualify Zwick from representing cross-defendants. Finding no error we affirm.

On May 15, 2009 just prior to oral argument Weiss filed a document entitled "Notice of

Additional Case Citation." This is, in fact, a supplemental brief filed without leave of court. The document is ordered stricken and shall be placed in the court's filed as "Received."

FACTS AND PROCEDURAL HISTORY

At the outset we note appellant's appendix violates the rules of court, which require that the contents be organized in chronological order. (Cal. Rules of Court, rules 8.124(d)(1), 8.144(a)(1©.) There is good reason for this rule. It makes review of the documents easier in contrast to the confusing appendix presented here with documents inserted in no discernible order.

Speer retained Weiss to represent him in a federal court employment discrimination action. During the pendency of the case Speer contacted attorneys Alquist and Zwick and asked them to review whether Weiss had overcharged him. When Zwick told him that employment attorneys had reviewed the billings and believed Weiss had overcharged him, Speer discharged Weiss. Zwick filed an action on Speer's behalf against Weiss for legal malpractice on theories of negligence and breach of fiduciary duty and for breach of the retainer agreement. The third amended complaint contained only causes of action for breach of the retainer agreement and breach of fiduciary duty based on alleged overbilling. When Weiss answered the complaint he also filed a form cross-complaint, which, although unclear, appears to be for assault against Speer and Zwick and intentional interference with contract/economic relations and fraud against Alquist and Zwick.

The intentional interference count alleged

Zwick interfered with Weiss's attorney-client relationship with Speer by falsely representing to Speer that Weiss had "grossly overbilled him," thus inducing Speer to stop paying Weiss. He also alleged Zwick "stole" Speer from him and prompted Speer to dismiss the employment action and bring the complaint against Weiss. The fraud cause of action essentially contained the same facts, alleging that Zwick's representation about overbilling was made as a statement of fact although he had not investigated.

*PAGE 2 Cross-defendants filed an anti-SLAPP motion, claiming the last two causes of action in the cross-complaint arose out of their right to free speech; the motion also attacked the exemplary damages claim. The court granted the motion as to Zwick on the causes of action for intentional interference and fraud, finding that Speer was referred to Zwick through a lawyer referral service and Zwick subsequently filed the action against Weiss. The communications between the two were absolutely privileged under Civil Code section 47, subdivision (b) and thus protected by section 425.16, subdivision (e)(2). It also found that, based on the absolute privilege, Weiss failed to show the probability of prevailing on the merits of these two causes of action. The court denied the motion as to exemplary damages, and also as to the other two cross-defendants on the ground they had no standing because the causes of action were not directed against them.

Cross-defendants also filed demurrers. The court sustained the demurrers with leave to amend as to the causes of action against Speer and

Alquist and ruled Zwick's demurrer was moot in light of the order granting the anti-SLAPP motion.

Heard at the same time was Weiss's motion to disqualify Zwick from representing Speer, which the court denied because Weiss failed to show any fiduciary relationship between himself and Zwick.

DISCUSSION 1. Anti-SLAPP Motion

a. Introduction

Section 425.16, subdivision (b)(1) provides that a cause of action arising from a constitutionally protected right of free speech may be stricken unless the plaintiff establishes the probability it will prevail on the claim. The court must engage in a two-step analysis under this section. First it must determine whether the defendant has met its burden to show "that the challenged cause of action is one arising from protected activity."(Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal.4th 728, 733.) If so, the burden shifts to the plaintiff to show the likelihood of prevailing on the claim. (Ibid.)

b. Protected Speech

Under section 425.16, subdivision (e) an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a ... judicial proceeding ...; [or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a ... judicial body...." ' 'A cause of action "arising from" defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike.'[Citations.]" (Rusheen v. Cohen

(2006) 37 Cal.4th 1048, 1056.) The protection under section 425.16"extends to conduct that relates to ... litigation...." (Kolar v. Donahue, McIntosh & Hammerton (2006) 145 Cal.App.4th 1532, 1537.) "[C]ourts have adopted 'a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16.' [Citation.]" (Ibid.) Under Civil Code section 47, subdivision (b), statements made in litigation or in anticipation of litigation are absolutely privileged. "'[J]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], ... such statements are equally entitled to the benefits of section 425.16.' [Citations.]" (Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1115; see also Salma v. Capon (2008) 161 Cal.App.4th 1275, 1285.)

*PAGE 3 Here, although the causes of action are labeled interference with economic relations or, alternatively, interference with contract, and fraud, they are based on communications between Speer and Zwick when the former contacted the latter about Weiss's legal representation, and primarily his billing. This was preparctory to the action Zwick filed against Weiss on Speer's behalf. Thus the statements fall within section 425.16, subdivision (e)(2).

Taheri Law Group v. Evans (2008) 160 Cal.App.4th 482 also supports grant of the motion. There the plaintiff sued the defendant, another attorney, for intentional interference with

prospective economic advantage and business relations after the plaintiff's client discharged the plaintiff and retained the defendant while still owing the plaintiff substantial fees. The court affirmed the grant of an anti-SLAPP order because those statements, communications relating to a pending action, were protected under section 425.16, subdivision (e)(2). (Taheri Law Group v. Evans, supra, 160 Cal.App.4th at p. 489.)

Relying on Edwards v. Centex Real Estate Corp. (1997) 53 Cal.App.4th 15, Weiss challenges applicability of the litigation privilege, claiming the statements did not satisfy four conditions required to protect prelitigation statements. Those include that the proposed litigation be imminent and that it must be based on good faith after serious consideration. (Id. at pp. 34-35.)The record reflects there was evidence supporting both conditions.

The declarations of Speer and Zwick filed in support of the motion state that Speer was dissatisfied with Weiss's representation, particularly because he believed he had been substantially overbilled for research that Weiss had previously performed. Speer told Weiss he did not believe Weiss was qualified to handle his matter and asked him to substitute out of the case, which Weiss refused to do. He also refused to dismiss Speer's action, despite Speer telling him he could no longer afford to pay.

Weiss then met with Zwick and explained his belief he was being overbilled. Zwick, who refused to take over the existing case, offered to have lawyers knowledgeable in employment law review the bills. A few days later Zwick told Speer those

lawyers believed Speer had been overbilled, whereupon Speer asked Zwick to represent him in a lawsuit to recover fees he had already paid to Weiss. Zwick agreed to do so and the action was filed within four months.

This is sufficient evidence to show both imminence and good faith. In addition, Neville v. Chudacoff (2008) 160 Cal.App.4th 1255 distinguished Edwards, pointing out that it was not an anti-SLAPP case and the communications at issue occurred over five years before an action was filed. (Id. at pp. 1268-1269.) In Chudacoff, where the court held the litigation privilege did apply, suit was filed within four months after the statements were made, the same time period as elapsed here.

*PAGE 4 In our case it is a reasonable inference that at the time Speer asked Zwick to meet with him and expressed his dissatisfaction with Weiss, and had his billings checked, litigation was imminent. This is especially true in light of the fact that Speer made his decision to sue at his second meeting with Zwick that occurred only a couple of days after his initial consultation.

Weiss's assertion the suit could not have been filed in good faith based solely on invoices does not withstand scrutiny. Overbilling is a proper basis for claims Weiss breached the retainer agreement and his fiduciary duty.

Weiss tries to avoid section 425.16's application by characterizing Zwick's alleged activity as the illegal manufacturing of evidence of a malpractice claim. But generally we look to the gravamen of the cause of action (Martinez v.

Metabolife Internat., Inc. (2003) 113 Cal.App.4th 181, 188), which here involves communication between a lawyer and a client. Additionally, just because conduct is allegedly wrongful does not remove it from the scope of section 425.16. (Birkner v. Lam (2007) 156 Cal.App.4th 275, 285. That exception "applies only if a 'defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law .'[Citation.]"(Ibid.)Neither of those conditions has been met here.

Weiss's claim that Zwick is not protected because he was functioning only as an investigator, not a lawyer, also fails. Buckley v. Fitzsimmons (1993) 509 U.S. 259 [113 S.Ct. 2606, 125 L.Ed.2d 209], on which Weiss relies, is inapt. There the action was brought under 42 United States Code section 1983 and dealt with whether prosecutors, investigating before the case was filed, as opposed to prosecuting the case, were entitled to absolute or qualified immunity. (Id. at p. 261.) That is not the issue here.

c. Probability of Prevailing

Because Zwick met his burden to show the communications fell within the protections of the statute, Weiss is required to show the probability of prevailing on his claims. To meet this burden he " " 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence [he] submitted ... is credited." ' [Citations.]" (Navellier v. Sletten (2002) 29 Cal.4th 82, 88-89.) This is similar to the standard

used on motions for a directed verdict, nonsuit, or summary judgment. (ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 1010.) In deciding this question, "the court does not weigh the credibility or comparative probative strength of competing evidence...." (Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811, 821.) On appeal, we independently review the trial court's ruling. (ComputerXpress, Inc. v. Jackson, supra, 93 Cal.App.4th at p. 999.)

Weiss did not meet his burden. As discussed above, communications between Zwick and Speer were made in contemplation of litigation. They are absolutely protected under the litigation privilege, section 47, subdivision (b) and are not actionable. (Flatley v. Mauro (2006) 39 Cal.4th 299, 323.)

*PAGE 5 Weiss's lengthy discussion of the prima facie elements of a malpractice action is completely irrelevant to the analysis. The causes of action against Zwick are for interference with contract and fraud, not manufacture of evidence as Weiss asserts in his discussion of the first prong nor malpractice as he seems to assert here. Likewise Weiss's arguments regarding the merits of the Speer's action against him have no bearing on the motion. And because the court denied the anti-SLAPP motion as to the assault cause of action, Weiss's discussion of the probability of prevailing on that claim is not germane and should not have been included in the brief.

2. Order of Hearing on Demurrer and Prohibition Against Amendment

Weiss complains the court erred in hearing

the anti-SLAPP motion before it heard the demurrer. Not so. In Simmons v. Allstate Ins. Co. (2001) 92 Cal.App.4th 1068 the court held that section 425.16 provides no right to amend a complaint to avoid an anti-SLAPP motion, noting that the purpose of the section is to review and resolve cases arising out of the exercise of free speech early in the process. (Simmons v. Allstate Ins. Co., supra, 92 Cal.App.4th at p. 1073.) "Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend. [P] ... This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits. [Citation.]" (Id. at p. 1073-1074)

Nguyen-Lam v. Cao (2009) 171 Cal.App.4th 858 is inapt. There the court allowed an amendment to a complaint to cure a limited deficiency that was the basis for the anti-SLAPP motion. But the facts contained in the proposed amendment were before the court in plaintiff's declaration in opposition to the motion. Thus, the plaintiff had "demonstrated a probability of prevailing at trial if she could amend her

complaint (id. at p. 873) and "there [was] no risk the purpose of the strike procedure [would] be thwarted with delay, distraction, or increased costs. [Citations]" (id. at p. 872). Such is not the case here. Weiss did not present facts in his opposition that would take the case out of the absolute protection of the litigation privilege.

As in Simmons, Weiss's "premise is faulty." (Simmons v. Allstate Ins. Co., supra, 92 Cal.App.4th at p. 1073. An anti-SLAPP motion does not deal with the adequacy of the pleadings but rather "pierces the pleadings and requires an evidentiary showing." (Ibid., italics omitted.) Therefore, an amended pleading was irrelevant.

*PAGE 6 For the same reason Weiss's argument that he filed a proposed amended cross-complaint prior to hearing on the anti-SLAPP motion that should have been the operative document fails. First, the copy in the appendix does not show a file stamp and Weiss points to nothing in the record to show it was filed. More importantly, an amended complaint cannot be used to defeat an anti-SLAPP motion. (Sylmar Air Conditioning v. Pueblo Contracting Services, Inc. (2004) 122 Cal.App.4th 1049, 1054-1055.)

As to his claim the statute is unconstitutional because it bars all discovery once the motion is filed, Weiss is wrong. Although section 425.16, subdivision (g) does stay discovery upon the filing of the motion, it also provides that on motion showing good cause, the court may allow specific discovery. Further, we are not aware of any authority for the proposition that discovery is a constitutional right.

Finally, we reject Weiss's claim section 592 required the demurrer be heard first. That section deals with the order of issues at trial, not hearings on motions.

3. Constitutional Challenges

Weiss makes several constitutional challenges to section 425.16 throughout the brief. These include claims that the prohibition against amendment after a motion is granted violates rights to free speech petition, due process, equal protection, and unreasonable seizure, is an excessive penalty clause, or works a forfeiture. But Weiss fails to make reasoned legal argument or cite any authority that shows or even suggests section 425.16 conflicts with these provisions. As a result, these claims are forfeited. (Evans v. CenterStone Development Co. (2005) 134 Cal.App.4th 151, 165.) Weiss's other challenges based on the U.S. Constitution and all other claims that are unclear or unsupported by authority and reasoned legal argument are also forfeited.

4. Motion to Disqualify Counsel

Weiss's discussion of his challenge to the denial of his motion to disqualify Zwick from representing Speer is deficient. An appellate brief may not merely rely "on the facts and legal argument ... tendered to the trial court," as Weiss does, but must "support each point by argument" (Cal. Rules of Court, rule 8 .204(a)(1)(B)). Paterno v. State of California (1999) 74 Cal.App.4th 68, 109 ["appellant cannot rely on incorporation of trial court papers, but must tender arguments in the appellate briefs"].) The remaining few sentences of this argument, that his standing to bring the motion

is based "on the intensity of [his] claim to justice" and grant of the motion "will reduce his burden" of relitigating, are equally inadequate.

DISPOSITION

The order is affirmed. The "Notice of Additional Case Citation" filed by appellant is ordered stricken and the document shall be placed in the court's file as "Received." Respondents are entitled to costs on appeal and also shall be awarded attorney fees on appeal in an amount to be determined by the trial court.

WE CONCUR: O'LEARY and IKOLA, JJ.

(I)(iv) The following are the California Statutes and Rules of Court involved. They are in alphabetical and numerical order.

Civil Code §4. Rule of Common Law

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice. [Enacted 1872]

Civil Code §47. Privileged Publication or Broadcast

A privileged publication or broadcast is one made:

(b) In any (2) judicial proceeding,

Code of Civil Procedure 4. Common Law Rule of Construction Not Applicable

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this State respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

C.C.P. §170. Judge's Duty When Not Disqualified

A judge has a duty to decide any proceeding in which he or she is not disqualified. [Added by 1984 ch. 1555.]

C.C.P. §425.16. Action Arising from Exercise of Freedom of Speech and Petition

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage

of the case or in any subsequent proceeding.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the

court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a

public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media. [Added by 1992 ch. 726; amended 1993 ch. 1239, 1999 ch. 960; 2005 ch. 535, eff. Oct. 5, 2005.]

C.C.P. §425.17. Applicability of the California Anti-SLAPP Law

(a) The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16.

(b) Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether

pecuniary or nonpecuniary, on the general public or a large class of persons.

(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person' s goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement

concerns an important public issue.

(d) Subdivisions (b) and (c) do not apply to any of the following:

(1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or Section 1070 of the Evidence Code, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.

(2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

(3) Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

(e) If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (j) of Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action. [Added 2003 ch. 338.]

C.C.P. §425.18. Special Motion to Strike a SLAPPback

(a) The Legislature finds and declares that a SLAPPback is distinguishable in character and

origin from the ordinary malicious prosecution action. The Legislature further finds and declares that a SLAPPback cause of action should be treated differently, as provided in this section, from an ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP (strategic lawsuit against public participation) litigation and by its restoration of public confidence in participatory democracy.

(b) For purposes of this section, the following terms have the following meanings:

(1) "SLAPPback" means any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Section 425.16.

(2) "Special motion to strike" means a motion made pursuant to Section 425.16.

(c) The provisions of subdivisions (c), (f), (g), and (i) of Section 425.16, and paragraph (13) of subdivision (a) of Section 904.1, shall not apply to a special motion to strike a SLAPPback.

(d)(1) A special motion to strike a SLAPPback shall be filed within any one of the following periods of time, as follows:

(A) Within 120 days of the service of the complaint.

(B) At the court's discretion, within six months of the service of the complaint.

(C) At the court's discretion, at any later time in extraordinary cases due to no fault of the

defendant and upon written findings of the court stating the extraordinary case and circumstance.

(2) The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(e) A party opposing a special motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary discovery. If it appears that facts essential to justify opposition to that motion may exist, but cannot then be presented, the court shall grant a reasonable continuance to permit the party to obtain affidavits or conduct discovery or may make any other order as may be just.

(f) If the court finds that a special motion to strike a SLAPPback is frivolous or solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(g) Upon entry of an order denying a special motion to strike a SLAPPback claim, or granting the special motion to strike as to some but less than all causes of action alleged in a complaint containing a SLAPPback claim, an aggrieved party may, within 20 days after service of a written notice of the entry of the order, petition an appropriate reviewing court for a peremptory writ.

(h) A special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law.

(i) This section does not apply to a SLAPPback filed by a public entity. [Added 2005 ch. 535, eff. Oct. 5, 2005.]

C.C.P. §592. Trial of Issue of Fact

In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code. [Added 1872; amended 1873 ch. 383.]

C.C.P. §598. Precedence of Issues

The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order, no later than the close of pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case, except for special defenses which may be tried first pursuant to Sections 597 and 597.5. The court, on its own motion, may make such an order at any time. Where trial of the issue

of liability as to all causes of action precedes the trial of other issues or parts thereof, and the decision of the court, or the verdict of the jury upon such issue so tried is in favor of any party on whom liability is sought to be imposed, judgment in favor of such party shall thereupon be entered and no trial of other issues in the action as against such party shall be had unless such judgment shall be reversed upon appeal or otherwise set aside or vacated.

If the decision of the court, or the verdict of the jury upon the issue of liability so tried shall be against any party on whom liability is sought to be imposed, or if the decision of the court or the verdict of the jury upon any other issue or part thereof so tried does not result in a judgment being entered pursuant to this chapter, then the trial of the other issues or parts thereof shall thereafter be had at such time, and if a jury trial, before the same or another jury, as ordered by the court either upon its own motion or upon the motion of any party, and judgment shall be entered in the same manner and with the same effect as if all the issues in the case had been tried at one time.

C.C.P. 632. Statement of decision

In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the

court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested the statement, any party may make proposals as to the content of the statement of decision.

The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties.

C.C.P. 634. Omission or ambiguity brought to attention of trial court; inference

When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue.

C.C.P. §901. General Provisions

A judgment or order in a civil action or

proceeding may be reviewed as prescribed in this title. The Judicial Council shall prescribe rules for the practice and procedure on appeal not inconsistent with the provisions of this title.

C.C.P. §909. Factual Determination by Reviewing Court in Cases Tried Without Jury

In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues.

C.C.P. §1003. Motion and Order Defined

Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

C.C.P. §1005.5. Motion Deemed Made and Pending Before Court on Service and Filing of Notice

A motion upon all the grounds stated in the written notice thereof is deemed to have been made and to be pending before the court for all purposes, upon the due service and filing of the notice of motion, but this shall not deprive a party of a hearing of the motion to which he is otherwise entitled. Procedure upon a motion for new trial shall be as otherwise provided.

Evidence Code 451. Matters which must be judicially noticed

Judicial notice shall be taken of the following: (a) The decisional, constitutional, and public statutory law of this state and of the United States.

COMMENT–ASSEMBLY COMMITTEE ON JUDICIARY

Judicial notice of the matters specified in Section 451 is mandatory, whether or not the court is requested to notice them. Section 451 includes matters both of law and of fact. The matters specified in subdivision (a) are matters that, broadly speaking, can be considered as a part of the "law" applicable to the particular case. The court can reasonably be expected to discover and apply this law even if the parties fail to provide the court with references.

Evidence Code 664. Official duty regularly performed

It is presumed that official duty has been regularly performed. This presumption does not

apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.
(Stats.1965, c. 299, s 2, operative Jan. 1, 1967.)

CALIFORNIA RULES OF COURT
C.R.C. 1.2. Title: "The rules in this title of the California Rules of Court may be referred to as the Rules Applicable to All Courts."

C.R.C. 1.3. Authority: "The rules in the California Rules of Court are adopted by the Judicial Council of California under the authority of article VI, section 6, of the Constitution of the State of California, unless otherwise indicated."

C.R.C. 1.5. Construction of rules and standards: (a) Construction. The California Rules of Court must be liberally construed to ensure the just and speedy determination of the proceedings that they govern."

C.R.C. 8.7. Construction: "The rules of construction stated in rule 1.5 apply to these [Appeal] rules. In addition, in these rules the headings of ... rules are substantive."

C.R.C. 8.20. California Rules of Court prevail."

CRC 8.120. Clerk's transcript
(b) Contents of transcript
(1) The transcript must contain:
(A) The notice of appeal;
(B) Any judgment appealed from and any notice of

its entry;
(C) Any order appealed from and any notice of its entry;
(D) Any notice of intention to move for a new trial, or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order, and any order on such motion and any notice of its entry;
(2) Each document listed in (1)(A), (B), (C), and (D) must show the date necessary to determine the timeliness of the appeal.

CRC 8.124. Appendixes instead of clerk's transcript
(b) Contents of appendix
(1) A joint appendix or an appellant's appendix must contain:
(A) All items required by rule 8.120(b)(1), showing the dates required by rule 8.120(b)(2);
(4) An appendix must not incorporate any document by reference except the record on appeal in another case pending in the reviewing court or the record in a prior appeal in the same case.

CRC 8.163. Presumption from the record
The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised.

CRC 8.204. Contents and form of briefs
(a) Contents
(1) Each brief must:
(A) Begin with a table of contents and a table of authorities separately listing cases, constitutions,

statutes, court rules, and other authorities cited;
(B) State each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority; and
(C) Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. If any part of the record is submitted in an electronic format, citations to that part must identify, with the same specificity required for the printed record, the place in the record where the matter appears.
(2) An appellant's opening brief must:
(A) State the nature of the action, the relief sought in the trial court, and the judgment or order appealed from;
(B) State that the judgment appealed from is final, or explain why the order appealed from is appealable; and
(C) Provide a summary of the significant facts limited to matters in the record.

(I)(v) FURTHER RECORD CITES WHERE FEDERAL ISSUES RAISED & PASSED ON

2(c). Declaration of Alquist said: "Zwick had attorneys in our building who are familiar with employment discrimination cases review Speer's billings to see if Speer was over billed. Each described the over billing as shocking. Based on this Zwick agreed to represent Speer in a case to recover billings." (AA p. 207:22 thru 208:6). Declaration of Zwick said: "I informed Speer those attorneys opined the fees charged for the services performed was shocking. Speer asked me if I would take on a case against Weiss to recover money for the over billing. I told Speer I would." (AA p. 212:20-27). Declaration of Speer said: "Zwick told me that he employment law attorneys reviewed my billings and it was their belief I had been over billed significantly. I asked Zwick if he would file a lawsuit so that I could get my money back. Zwick agreed to do that. I then hired Zwick to recover fees I paid Weiss." (AA p. 218:22-219:1).

4. (AA p. 104) which at paras 9 & 10 requested factual and legal explanation of why Weiss had not proven as a matter or law, or by a reasonable probability, that Zwick's solicitation of opinion of over billing by Weiss, when he functioned as investigator and provided nothing but Weiss' invoices, was not valid U.S. Petition Clause activity. Paras. 11 & 12 requested factual and legal explanation of why Weiss had not proven as a matter of law, or by a reasonable probability, that when Zwick functioned as advocate and filed a

baseless sham lawsuit, such was not valid U.S. Petition Clause activity.
Para. 18 requested factual and legal explanation why hearing the anti-SLAPP motion before the Demurrer was not a Due Process Clause violation under Armstrong v Manzo.
Para. 20 requested factual and legal explanation why Weiss lacked standing under U.S. Due Process Clause to bring disqualification motion.

5. (AA p. 118 as follows: The SOD failed to address requests 9, 10, 11, 12, 18 and 20 (AA p. 119:2-9). SOD is ambiguous as to request 18 (AA p. 119:10). SOD is ambiguous as to 5, 6, and 7, as to why Cross Complaint was determined to seek liability based only on the Speer's 3rd Amended Complaint and not on his prior Attorney Malpractice claims. See also RT 21:2 "My SOD requested facts demonstrating my Cross Complaint arose because of Speer's 3rd Amended Breach of Contract lawsuit." See also RT 18:19-23.

6. ["16. The U.S. Petition Clause does not immunize unethical conduct such as perjury, fraud nor sham lawsuits. CALIFORNIA MOTOR TRANSPORT CO. v. TRUCKING UNLIMITED (404 U.S. 508, 512-513)." (AA p. 230:20-21); "11. Sham litigation is not protected by the Petition Clause of the U.S. Constitution. No reasonable litigant in Speer's posture could conclude that a cause of action against Weiss for Attorney Malpractice would be successful due to failure to aver the required case within a case facts. BE & K Const. Co. v. National Labor Relations Board (536 U.S. 516, 526); Professional Real Estate Investors,

Inc. v. Columbia Pictures Industries, Inc. (508 U.S. 49, 60-61); Hi-Top Steel Corp. v. Lehrer (24 Cal.App.4th 570, 578-579 (1994). Speer never even authorized Zwick to file an Attorney Malpractice suit but rather one to recover back the attorney fees he paid to Weiss." (AA p. 228:19 thru P. 229:9); "5. C.C.P. 410.10 clearly mandates that a state court may not exercise jurisdiction on any basis inconsistent with the Constitution of the United States. Hence the Civil Code 47(b) litigation privilege cannot be used to expand its coverage to include neither speech nor conduct at a time when Zwick acted as investigator and before he first functioned as advocate. Nor can it be used to expand its coverage to include the sham and baseless Attorney Malpractice lawsuit filed after Zwick functioned as advocate." (AA p. 68:11-16). "The SOD contains errors and incorrect legal basis for its decision by including everything within the compass of Civil Code 47(b) within 425.16." RT 19:1-6; 'The courts decision says under 425.16 all activity protected by litigation privilege is necessarily protected by the anti-SLAPP statute. The word all' is erroneous and incorrect."

7. "14. Fraud is not protected under the U.S. Petition Clause. The deceptive practices of Zwick & Alquist included false reliance on two attorneys who "believed" the fees charged by Weiss were shocking. Their beliefs were not genuinely used by Zwick and Alquist to ground litigation; but, were a sham device knowingly used to abuse the judicial process, and to injure Weiss. ALLIED TUBE & CONDUIT CORP. v. INDIAN HEAD, INC (486 U.S. 492,

500, 507, fn 10, 508, 509)." (AA p. 229:22 thru p. 230:15); "15. The U.S. Petition Clause does not immunize Speer, nor Zwick & Alquist, from statutory regulation and liability because they improperly used that Clause as a means of disrupting the existing contractual relationship between Speer and Weiss. CALIFORNIA MOTOR TRANSPORT CO. v. TRUCKING UNLIMITED (404 U.S. 508, 514)" (AA p. 230:16-19); "The Free Speech Clause does not protect defamation, fraud, fighting words, obscenity, nor baseless/sham litigation. McDonald v. Smith (472 U.S. 479, 482, 484-485)." (AA p. 226:3-7); "The U.S. Petition Clause does not protect sham and baseless litigation, BE & K Const. Co. v. National Labor Relations Board (536 U.S. 516). See RT 7:1-19. The U.S. Petition Clause does not protect an attorney when he functions as investigator prior to functioning as advocate, Buckley v. Fitzsimmons (509 U.S. 259). See RT 8:2-23." (AA p. 36:23 thru p. 375); "Weiss presented evidence that the Attorney Malpractice lawsuit was sham, and baseless, objectively and subjectively speaking, and that Zwick did not function as advocate but rather investigator, when seeking out fabricated evidence of gross overbilling in order to support a malpractice suit. Such conduct is not "valid" U.S. Petition Clause activity even had Speer requested Zwick and Alquist to file a malpractice suit per BE & K Const. Co. v. National Labor Relations Board (536 U.S. 516) and Buckley v. Fitzsimmons (509 U.S. 259)." (AA p. 48:10-16); "17. Weiss either established as a matter of law, or as a matter of probability, that Zwick neither communicated, nor acted, in a way to claim valid exercise of his U.S. Petition Clause

rights." (AA p. 72:24-26).

14. ["10. The court ruled on the Demurrer before the Anti-SLAPP motion. It was a federal Due Process Clause violation as well since cross-complainant was saddled with a burden or proof not warranted under the Demurrer." (AA p.23:14-23); "In our case only by vacating the anti-SLAPP Judgment and Order on Demurrer to Cross-Complaint and by entering a new and different Order/Judgment authorizing leave to amend the Cross-Complaint as to Zwick can Weiss's constitutional right to due process as defined by C.C.P. 592, C.C.P. 1005.5, and C.C.P. 170 be vindicated." (AA p. 40:12-22); 21); "Under C.C.P. 598 Honorable Judge Moberly could not, and did not, make an "order" giving precedence to issues in the anti-SLAPP motion over issues in the Demurrer; and, this is because no motion to do the same was made by Speer, Zwick and Alquist nor the court. For the court to make a motion sua sponte it had to be in writing, because CRC 3.1103(a) required motions to be made "before" trial not at the trial itself; because CRC 3.1110, CRC 3.1112 and CRC 3.113 all required motions to be in writing and not be made orally; and, because C.C.P. 1003 defines Order as one made "in writing". (AA p. 38:15-22); "3. [U]nder C.C.P. 1005.5 a motion is deemed to be made and pending for all purposes upon the filing and service of the Notice of Motion. In our case the demurrer to the Cross-Complaint, a motion per CRC 3.1103, was made and pending "for all purposes" as of 5-30-08 per its proof of service and the courts docket registry. The anti-SLAPP motion on the other hand

was not made and pending for all purposes until 7-1-08 once again per its proof of service and this courts docket registry. Had the current rule of C.C.P. 1005.5 and C.C.P. 592 been correctly applied the anti-SLAPP Judgment would not have issued. This is because a ruling on the demurrer would have mooted out the anti-SLAPP motion. This court instead mooted out the demurrer based on the ruling concerning the anti-SLAPP motion. Weiss duly objected, see 8-19-08 reporters transcript at 1:12-23 and 3:15 thru 5:14 and 12:9-19 and 13:19-23. (AA p. 38:23 thru p. 39:8); The court ignored that challenge and the resulting actual injury and prejudice was obvious because Weiss' constitutionally protected intangible property in the form of his cross-complaint was taken away in violation of constitutional and statutory due process. Had the Demurrer been determined first the anti-SLAPP Motion would have become moot." (AA p. 39:16-21);

20. ["24. There is no absolute judicial immunity for Zwick & Alquist for functions they performed as administrators or investigators for Law Office of Steven Zwick. Attorneys are not advocates of law while investigating a proposed concern. If they make plans to fabricate or conceal evidence regarding that concern they are liable. Nor are they immune from defamation or unfair competition while acting as administrators and not as advocates or officers of the Court. Any such tortious course of conduct occurred before they could properly claim to be acting as advocates. Instead only qualified immunity is provided. In this

case such was lost because of clearly established law forbidding fabrication or concealment of evidence. Zwick & Alquist knew it was legally impossible for their 2 attorney friends to make any belief by merely looking at the service invoices without also reviewing the client goals and strategies and the case files. The two attorney friends of Zwick purportedly confirmed to him & Alquist not only that Weiss grossly overbilled, but also billed for services not performed, similar to the "positive identification" of the unreliable expert in the Fitzsimmons Case cited below. Zwick & Alquist cannot shield their administrative work with the aegis of absolute immunity merely because they later used the fabricated evidence since any attorney could shield himself from liability for any constitutional wrong by ensuring that a lawsuit was eventually filed. The injuries suffered by Weiss by such tortious conduct of Zwick & Alquist including defamation, unfair competition, and fraud, occurred before they functioned as advocates for Speer. Buckley v. Fitzsimmons (509 U.S. 259; 262, 269, 274, 277-278, fn 7 fn 8)" (AA p. 232:6-26); "35. This court determined the Attorney Malpractice claim against Weiss was objectively meritless and that Speer had voluntarily abandoned any further attempt to plead it. Evidence: Minute Orders dated 10-16-07 and 1-24-08 (AA p. 234:27 thru p. 235:3; "41. Zwick told Speer he himself wanted a piece of Weiss. Evidence: Weiss time card of 4-19-07." (AA p. 236:3-5); "44. Zwick has never once physically appeared before the court on this case either." (AA p. 236:19-21); "49. Cross-Complainant submits a proposed 1st Amended Cross-

Complaint in connection herewith and requests leave to file it
should his Opposition otherwise be denied." (AA p.238:16-18); "12. Jaffe v. Stone (18 Cal.2d 146 (1941) held that the "favorable termination" prima facie element of the tort of malicious prosecution does not mean final termination of the entire case; rather it includes favorable termination of one cause of action out of a number of causes of actions if it has been terminated in such a manner as to show the innocence of the party accused of wrongdoing (Id. P. 156). Favorable termination of Speer's Attorney Malpractice cause of action occurred on 1-24-08 when this court sustained Weiss's demurrer since it failed to aver the requisite facts within a case facts. The sustaining of that demurrer was a legal termination showing the innocence of Attorney Malpractice because a demurrer accepts as true all the facts stated in the Complaint and the demurrer is a trial on those facts. This court noted in its Minute Order of 4-3-08 that Speer voluntarily abandoned any attempt to re-plead the Attorney Malpractice cause of action. Zwick in open court admitted "we dismissed it" referring to the Attorney Malpractice cause of action indicating it was voluntarily dismissed, see 8-19-08 RT 9:18-21. (AA p. 42:12 thru p. 43: 7); "14. Baker v. Gawthorne (82 Cal.App.2d 496, 500-501 (1947) and Sierra Club Foundation v. Graham (72 Cal.App.4th 1135, 1154 (1999) held that a client could be liable for malicious prosecution when he fails to conduct an inquiry into suspicious circumstances [under Civil Code 19] which lead him to fail to disclose to his attorney all the facts

I(vi) Other Matter Essential.

PROPOSED 1ST AMENDED CROSS COMPLAINT
PRELIMINARY AVERMENTS

1. The following preliminary averments are hereby incorporated into the following causes of action averred in this Cross-Complaint.
2. Zwick and Alquist acted in concert, either as Principal-Agent, Employer-Employee, or as co-conspirators, aiders & abettors, and are otherwise responsible for the torts of Speer averred herein
3. As an actual and proximate cause and result of the acts and omissions averred herein Weiss has sustained economic and non economic damages in a sum in excess of $100,000.
4. As a direct and proximate result of the conduct of cross-defendants, and each of them, cross-complainant has suffered and will continue to suffer physical injuries, past and future medical expenses for physical injuries caused by defendants, humiliation, mental anguish, and acute fear.
5. Cross-Defendants' violation of plaintiffs' rights as guaranteed by Civil Code sections 52.1 and 51.7 entitle Cross-Complainant to compensatory and punitive damages, a $25,000 civil penalty, attorney fees, and injunctive relief, all of which are provided for in Civil Code sections 52.1(b) and 52, and are requested.
6. In doing the acts alleged in this complaint, defendants knew or should have known that their actions were likely to injure cross-complainant. Cross-complainant is informed and believe, and

therefore allege, that cross-defendants intended to cause injury to cross-complainant and acted with a willful and conscious disregard of his rights as secured by Civil Code sections 51, and 52.1, thus entitling him to recover punitive damages pursuant to Civil Code section 52(b)(1), and to recover treble damages, or a minimum of $250 pursuant to Civil Code section 52(a).

CIVIL CODE 52.1 CAUSE OF ACTION
AGAINST SPEER, ZWICK & ALQUIST

7. On 1-18-07 in Orange County, California, Speer maliciously and repeatedly harassed Weiss and made a credible threat to kill Weiss with the specific intent that he take that his words as a threat, and that he be placed in reasonable fear for his safety by screaming and using vulgarity, profanity, and saying "Pray for yourself wherever you are going to wind up." The threatened crime on its face; and, the way it was made, conveyed an immediate and specific gravity of purpose to Weiss, and Weiss was reasonably in sustained fear of his safety based on Speer's threat. Speer was a highly emotionally charged individual, taking heavy narcotic drugs for pain, and was excluded from his workplace because of making threats of physical violence to his supervisors and co-workers. As a result Weiss today lives in daily fear of him
because of Speer's last threat. Speer had previously on multiple occasions orally abused Weiss. Speer, in the United States District Court xerox room remarked to the employee taking his order "I hate to kill attorneys." Speer's outrageous conduct of 1-18-07 was thus done with intention to cause, or reckless disregard of the probability of causing,

emotional distress. In engaging in the above-described threat, Speer acted intentionally, maliciously, recklessly, and/or negligently so as to proximately cause Weiss to suffer severe and extreme mental anguish, pain, suffering and physical distress, all to Weiss's damage in the sum well in excess of the minimum jurisdictional amount of this Court. As an employee-attorney representing Speer in his lawsuits employer-Speer was in a position of actual or apparent power over Weiss. Weiss did not consent to being threatened by Speer. Weiss was peculiarly susceptible to emotional distress because Speer's lawsuits had underpinnings involving workplace threats of violence uttered by Speer.

8. Zwick misrepresented to Speer that Weiss' committed malpractice, breach of fiduciary duty, breach of contract and grossly overbilled him, which caused Speer to infringe on Weiss's rights under Civil Code 43 to be free from personal insult and his rights under Cal. Constitutional to privacy insofar as Speer made unwanted telephone calls to Weiss in which he personally insulted Weiss, coerced, intimidated and harassed Weiss.

9. On 1-18-07 Speer called Weiss during which he personally insulted Weiss by saying in part: "What kind of monster are you? Have a nice day and pray for yourself wherever you are going to wind up." Due to the other content of the conversation Weiss understood it as a threat to kill him.

10. On 4-19-07 Speer telephone Weiss and said "I have a malpractice attorney who wants part of you. I will pay nothing on your bill. I owe you nothing. You should pay all future deposition costs

etc as well as work on a pure contingency basis." During that conversation Speer insulted the intelligence of Weiss as well as his work product.
11. Zwick either (a) caused (b) aided and abetted or (c) is otherwise responsible for the tort of Speer in committing personal insult upon Weiss. Zwick and Alquist gave substantial assistance or encouragement to Speer to so act. Zwick's course of conduct was a substantial factor in causing Speer's infringement of Weiss' statutory and constitutional rights.
12. Zwick knew under Civil Code 19 and the court documents in the underlying Speer Federal and State litigation that Speer was accused of insults, using profanity, and making threats to the personal safety of his supervisors and co-workers; and, was physically barred from entering his workplace because of such threats.
13. Speer intended to interfere by coercion, threat, and intimidation with Weiss' rights to be free from personal insult and assault, defamation, and breach of contract/quantum meruit. Zwick interfered with, or attempted to interfere with, Weiss' statutory rights under Civil Code 43 and his California Constitutional right to privacy from unconsented and unwanted intrusion by telephone in which Speer yelled out personal insult, vulgarity, coercion and harassment to Weiss. Weiss was indeed harmed by infringement of his statutory and Constitutional rights because he continues to live in fear of his life.
14. Speer's speech was coercive because it restrained or dominated Weiss' attempt to reply; it dominated the conversation by nullifying Weiss's will

to reply; it was uttered by Speer to compel Weiss to submit to Speer's insults, threats, instructions, and profanity. Speer's speech was threatening as it gave signs and warnings of trouble, punishment, or retribution if not followed. Speer's speech was uttered to make Weiss timid, fearful and frightened.

INTENTIONAL INTERFERENCE WITH CONTRACT AGAINST ZWICK AND ALQUIST

15. A valid attorney-client retainer contract existed between Speer and Weiss dated 5-2-2005; and an oral amendment which was fully executed or otherwise put out of the power of Weiss to perform.

16. Zwick knew of the existence of that retainer contract.

17. Weiss was entitled to the quiet enjoyment of his contract with Speer.

18. Continuation of the Weiss/Speer contract gave Weiss economic advantage.

19. Zwick & Alquist engaged in a tortious course of conduct between February 2007 through the present designed to disrupt the contract existing between Weiss and Speer and any further business from Speer to Weiss. Zwick & Alquist induced Speer to undertake sham litigation against Weiss because they conducted no reasonable investigation into the matters but instead relied on the belief of 2 attorneys in their office building that not only were the Weiss's invoices grossly excessive and shocking, but he did not perform the work he billed for.

20. Zwick committed an intentional course of conduct designed to induce a disruption or breach of that retainer contract by making known false representations about attorney malpractice, gross overbilling, breach of contract and breach of

fiduciary duty. Such misrepresentations were a form of unfair competition and a fraud on the court. Zwick knew that Speer had not paid about $24,000 to Weiss for services and costs rendered in the underlying litigation but he told Speer that Speer did not have to pay them, and that he could get all the money back plus punitive damages and they both could make money off Weiss and that Zwick wanted a piece of Weiss. Zwick averred in Speer's Original and three Amended Complaints that Speer fully performed all conditions and promises to be perform on his part under the retainer agreement knowing full well that such averment was false.

INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATION

AGAINST ZWICK AND ALQUIST

21. Zwick intentionally interfered with the 5-2-2005 attorney-client contract between Speer and Weiss by falsely saying, among other things, around and about February 2007 in Mission Viejo, California, that Weiss grossly overbilled him and that he wanted a piece of Weiss. Thereafter in April 2007 Speer instructed Weiss to dismiss all his lawsuits, which Weiss did therefore loosing all existing as well as potentially recoverable attorneys fees and future business from Speer in a sum exceeding $100,000.

22. By wrongful means Zwick induced Speer to fail to pay his attorney bills under an existing contract with Weiss and therefore interfered with the economic relationship existing between Speer and Weiss.

23. The wrongful means are alternatively states as:

A. The intentional, fraudulent, and deceitful

representation of fact that Weiss had grossly overbilled Speer.

B. By representing to Speer that not only did he not have to pay any more fees to Weiss, but that Speer and Zwick could make money off Weiss by suing him for malpractice based upon gross overbillings.

C. By means of using undue influence operating on the mind of Speer who he knew was, and had been for years, under the care of doctors and psychiatrists who had prescribed morphine and multiple other drugs for Speer to ease the pain caused by vertebrae problems in his upper neck and lower back. Weiss sent a purported suicide note by Speer to Zwick in April 2007 warning him of Speer's condition; but, Zwick in conscious indifference to the safety of Speer, Weiss, the Judge in this case, and others, nonetheless urged Speer to bring suit. Zwick knew that if Speer won in the 9th Circuit that victory would go a long way in easing his emotional condition; and vice-versa that losing or dismissing his lawsuits would result in no vindication and hence go a long way in exacerbating his weakened mental condition. Zwick's conduct was hence malicious and despicable under the circumstances.

24. Zwick acted with intent to harm Speer and well as Weiss; or alternatively acted in conscious disregard or reckless indifference to their safety and economic interests as follows:

A. Zwick deprived Speer of a 9th Circuit decision. Zwick interfered with the Petition Clause rights of Weiss and Speer by impliedly urging Speer to dismiss his lawsuits. Had Speer prevailed in the 9th

Circuit a settlement would probably have followed, but Zwick's intermeddling pre-empted that option.

B. Zwick, acted with intent to profit himself financially when he stole Speer away from Weiss. Zwick knew that had Speer won in the 9th Circuit he would be awarded attorney fees and costs under 42 U.S.C. 1988 or other statute. He knew that further representation of Speer would generate more attorney fees for Weiss; however Zwick himself unilaterally decided that Weiss had too much fees already, and advised Speer stop paying, and then sue him to recover back the fees he already paid. Zwick did not advise Speer to file a Declaratory Relief lawsuit seeking a determination that he had the right to terminate the contract due to gross overbilling; rather Zwick acted outside the role of a proper attorney and made that determination himself hoping to pocket the fees Speer owed to Weiss through a malpractice suit. Zwick knew that if he was wrong about overbilling that Speer could be held liable to Weiss for either the $24,000 under written contract or another sum under quantum meruit; but he acted in conscious indifference to those consequences when inducing Speer to bring a malpractice suit.

25. By falsely representing to Speer that Weiss overbilled him and committed attorney malpractice Zwick's representations tended to persuade Speer to withdraw his business from Weiss. Speer's frivolous and sham malpractice suit tends to damage Weiss from future business with Speer and the entire legal community around the world as his defamatory filing is a public record for all to read.

26. An existing and potentially future economic relationship existed between Weiss and Speer which Zwick had knowledge of; and, Zwick's acts were designed to induce a termination, breach, or disruption of that relationship by making performance of the Speer/Weiss contract more burdensome or more costly than it should have been. Zwick succeeded in causing a breach, termination and disruption of the economic relationship between Weiss & Speer in that Speer instructed Weiss to dismiss all his litigation and fired Weiss and then brought malpractice suit against him. As an actual and proximate cause and result of Zwick's malevolent interloping Weiss has sustained economic and non-economic damages in an amount currently unknown, but over this courts minimal jurisdictional amount.

27. Zwick violated Business and Professions Code 17500 when making the false representation that Weiss grossly overbilled Speer; and by aiding and abetting, or otherwise inducing Speer, to terminate all his litigation, fire Weiss, and then sue him for malpractice.

28. Had it not been but for Zwick's representations to Speer, Speer would not have done what he did. Had Zwick not uttered his false inducements to Speer, Speer would not have instructed Weiss to dismiss all his lawsuits, fire Weiss, nor sue him for malpractice.

MALICIOUS PROSECUTION
AGAINST SPEER, ZWICK AND ALQUIST

29. Speer's Original, 1st and 2nd Amended, Complaints for Attorney Malpractice were commenced by or at the direction of the

defendant and was pursued to a legal termination favorable to the plaintiff; they were brought without probable cause; and they were initiated with malice.

30. No reasonable litigant in Speer's position could realistically expect success on the attorney malpractice claim since the malpractice suit did not even aver the required "case within a case" facts.

31. The subjective motive of Speer in filing the attorney malpractice suit against Weiss was driven by a desire to switch his claim from non-service connected injury to service-connected injury, and thus receive monetary long term disability benefits from O.C.E.R.S., while at the same time recovering all the attorney fees he paid to Weiss and avoiding the rest of the unpaid fees to Weiss. That switch was a fraud upon O.C.E.R.S. and Weiss. Further evidence of bad intent by Speer was his use of profanity, personal insult and threat to kill Weiss. Speer wanted to make Weiss suffer emotionally, physically and reputationally. Further evidence of subjective bad intent include Speer's claim of punitive damages without any factual averments warranting same, and claim for attorney fees for breach of contract when the contract did not provide for them.

32. This court determined the attorney malpractice claim against Weiss was objectively meritless and that Speer had voluntarily abandoned any further attempt to plead it. Abandonment is evidence of subjective bad motive as most people do not abandon what they consider meritorious litigation.

33. Zwick knew that his statements to Speer that the

Invoices of Weiss were shocking and grossly excessive were false; and, he acted in conscious disregard of the truth, being motivated by feelings of ill will toward Weiss. This is because Zwick had no opinion of his own since he was not qualified in Labor Law to render such opinion; relied on the belief of 2 attorneys in his office building who themselves were given nothing but the Invoices and no information about the goals and strategies of Speer nor Weiss; nor given the litigation, exhibit, witness, or correspondence, files of the underlying Speer litigation.

34. Speer, Zwick & Alquist, knew that the attorney malpractice claim was false and unsupported when it was filed; or, alternatively they made that claim in purposeful avoidance of the truth.

35. Zwick induced Speer to initiate, and then maintain, an attorney malpractice suit against Weiss due to his corrupt motive of financial; and, passionate hostile, interest. Zwick told Speer he himself wanted a piece of Weiss.

36. The Weiss invoices billed for services that were publicly filed. The billing for publicly filed documents refuted the averment that Weiss billed for services not performed. Speer, Zwick & Alquist have no evidence that Weiss did not perform the other services he billed Speer for and that allegation is baseless. Weiss in fact billed only for services actually rendered.

37. Although Zwick's 4-26-07 letter to Weiss sought a reply to the averments in a proposed malpractice suit attached thereto; and, although Weiss replied, never once thereafter up to the present day has Zwick orally spoken one word to Weiss about

anything in the case, nor even reply in writing to the 4-26-07 and 4-28-07 reply letters of Weiss.
38. Zwick has never once physically appeared before the court on this case either.
39. Weiss's contractual relationship with Speer was interfered with by Zwick & Alquist. Under the Weiss/Speer contract and underlying litigation that attorney fees were recoverable under 42 U.S.C. 1988, the Americans With Disability Act; and, the Government Code. Recovery of those fees was reasonably expected.
40. Performance by Weiss under the Weiss/Speer contract was interfered with by Zwick & Alquist since after they told Speer that Weiss breached his contract with Speer, breached his fiduciary duties to him, committed malpractice, charged him fees that were grossly excessive, shocking, and would sue to recover punitive damages and attorney fees under the Weiss/Speer contract, Speer instructed Weiss to dismiss all his litigation and fired Weiss. Such representations by Zwick & Alquist were false and made either with malice, intent to avoid the truth of the matters, with reckless or conscious indifference to the rights of Weiss to safety, freedom from personal insult or threat from Speer, and/or the rights of Weiss under the Speer/Weiss contract or the liberty and property rights of Weiss under the U.S. Due Process Clause or his right of access to courts under the U.S. Petition Clause made applicable upon the States by the Fourteenth Amendment Due Process Clause.
41. The power, strategy and resources of Zwick & Alquist were used solely to harass and deter Weiss in his US Petition Clause right of access to courts

including the right to be heard in a meaningful manner ie without perjury, fraud, due to filing and maintaining a sham attorney malpractice suit against him for about 1 year until they abandoned it after the court found it unmeritorious due to failure to aver a case within a case facts. Zwick & Alquist diminished the value of Weiss's business by filing the sham malpractice lawsuit, interfered with his existing contract relations with Speer, interfered with his prospective economic relations with Speer, injured his reputation publicly, caused him to suffer emotional and physical injury; and, caused him to loose wages he otherwise would have earned had he not chosen to defend himself against such sham litigation. Those injuries were the goal and intent of Speer, Zwick & Alquist.

42. Further evidence of subjective bad intent by Zwick include his statement that he "wants a part of Weiss"; his failure to serve the 1st amended Complaint, instead fraudulently inducing Weiss to make a general appearance based upon service of only the original Complaint; failure to reply to Weiss's letter of 4-28-07; and the fact that Zwick and Alquist have an actual conflict of interest in this case and in bad faith assert there is no conflict of interest.

BREACH OF CONTRACT/QUANTUM MERUIT AGAINST SPEER

43. Under the Speer/Weiss Retainer Contract, as written and subsequently modified, it was agreed that Weiss would provide legal services for Speer specifically designed to avoid Workers Compensation claims. Weiss fully performed by filing lawsuits in state and federal court, as well as

an Appeal in the Ninth Circuit. Weiss also acted in place of Speer's Union representative in meetings with Speer's employer. Shortly before oral argument in the Ninth Circuit, Speer instructed Weiss to dismiss all Speer's litigation, which Weiss did. Speer's instructions were made because Speer wanted to change position and claim his injuries were service-connected in order to get long term disability benefits from O.C.E.R.S. At the time of Speer's instructions to dismiss his litigation he owed an unpaid balance in excess of $23,000 which remains unpaid today; and interest at the legal rate is sought.

44. Alternatively stated, Speer knew that Weiss would perform services at a reasonable rate and Speer with knowledge requested Weiss to perform such services.

FRAUD

AGAINST ZWICK AND ALQUIST

45. Zwick knew Speer's proposed Original Complaint against Weiss for malpractice attached to his 4-26-07 letter, was generated without his having authorization nor sufficient evidence or cause to file it because neither he nor anybody on his behalf conducted reasonable inquiry by reviewing the underlying Speer litigation, evidence, witness, and correspondence, files. Zwick had no knowledge of the litigational goals and strategy of Speer nor Weiss.

46. The 4-26-07 letter of Zwick was meant as a tactical ploy to induce a money settlement by Weiss and there was no indication that litigation was imminent. The 4-26-07 Zwick letter was not written in a good faith belief that a legally viable

claim for attorney malpractice existed.
47. Speer, through Zwick's 4-26-07 letter violated Civil Code 1572(1)(2)(3)(5) by making false contractual claims to Weiss during the time Speer's pending underlying litigation was active in April 2007. Those claims required Weiss to investigate by expending time and money which he would not otherwise have undertaken. Those claims were false as Speer and Zwick knew. Those claims alternatively were made by Speer and Zwick without sufficient information to make them.
48. Zwick filed Speer's original complaint for reasons personal to himself; it to get a piece of Weiss. Zwick intended to steal or convert the approximate $24,000 that remained unpaid by Speer.
49. Zwick knew the averments in Speer's original, 1st, and 2nd amended complaint were false. Zwick alternatively knew he made no reasonable investigation of their averments and hence had no reasonable ground to believe them to be true.
50. Zwick continues to maintain Speer's 3rd amended complaint with knowledge the averments are false.
51. In and about February 2007 when meeting to discuss a concern of Speer about Weiss's billings, Zwick informed Speer that Weiss grossly overcharged Speer as a matter of fact, not opinion. Zwick made the assertion, as a fact, of that which is not true by one who had no reasonable grounds for believing it to be true. Zwick made no factual investigation into the facts regarding Speer's existing litigation, nor of Speer's unique contractual needs, nor of the reasons for the billings that Weiss invoiced Speer, nor about the reasonableness of the fees

from an disability discrimination expert witness. The representation made by Zwick was in fact false. The true facts were that the charges were reasonable as a matter of fact. In unjustifiable reliance upon these representations, Speer fired and sued Weiss shortly before oral argument in the Ninth Circuit Court of Appeals. Had Speer known the actual facts, he would not have taken such action.

52. Speer and Zwick's conduct arose from hatred and ill-will toward Weiss and a desire to oppress him and with the wrongful intention of injuring him. The conduct was taken with an improper and evil motive amounting to malice and in conscious disregard of the rights and safety of Weiss. Speer threatened to kill Weiss, instructed him to dismiss all his litigation for deceitful reason, and then sued to recover the money he paid for the services rendered by Weiss. Because the actions taken toward Weiss were carried out in a cold, deliberate, callous and intentional manner in order to injure and damage Weiss, and cause him to live in fear, he is entitled to recover punitive damages from Speer and Zwick in an amount according to proof and in an amount appropriate to punish and make an example of them.

WHEREFORE, Cross-Complainant request judgment against
defendants as follows:

1. General damages according to proof;
2. Special damages according to proof;
3. Punitive damages pursuant to Civil Code section 52(b)(1);
4. A statutory civil penalty of $25,000 pursuant to Civil Code

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(2)

No. 09-515

Supreme Court, U.S.
FILED
NOV 25 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL WEISS,

Petitioner,

v.

STEVEN SPEER, STEVEN ZWICK, JAMES ALQUIST,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Fourth Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is CCP Section 425.16 (California's Anti-Slapp Statute) unconstitutional on its face or as applied under the U.S. First Amendment made applicable in California by the Fourteenth Amendment?

2. Did the California Appeals Court unreasonably misconstrue Petitioner's causes of action, evidence, and U.S. Constitutional rights and challenges?

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INTRODUCTION

On May 28, 2009, the Court of Appeals of the State of California, Fourth Appellate District, Division Three issued their opinion regarding an appeal by Petitioner herein Michael Weiss, wherein Weiss had argued that the underlying Trial Court in the Superior Court of Orange County, California had improperly denied Weiss an opportunity to file an Amended Complaint after the underlying Trial Court had ruled that portions of a Cross Complaint by Michael Weiss were to be stricken pursuant to the California Anti-Slapp Statute (California Civil Procedure Code § 425.16(b)).

The California Appellate Court found

> allowing a slapp Plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from § 425.16's quick dismissal remedy. Instead of having to show a probability of success on the merits, the slapp plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend. This would totally frustrate the legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits.

(Appellate Court Ruling at p.9).

Petitioner herein Weiss sought to have the Appellate Court ruling reviewed by the California Supreme Court, however, Weiss' Petition for review was denied. (Please see p.36 to Petitioner Weiss' instant Petition for Writ of Certiorari).

Respondents herein assert that the Supreme Court of California in the case entitled *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal.4th 1106 (1999) has already decided that all activity protected by the litigation privilege, California Code of Civil Procedure § 47(b), including activity in anticipation of litigation, is necessarily protected by the Anti-Slapp Statute. Thus, Respondents' herein Anti-Slapp motion arises from an act in furtherance of the Respondents' right of Petition for free speech under the United States or California Constitution in connection with a public issue. (Please see California Code of Civil Procedure § 425.16(b)(1)).

For these reasons, Weiss' instant Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

On May 9, 2008, Defendant Cross Complainant MICHAEL A. WEISS, an Attorney, filed a Cross Complaint against his former client, STEVEN SPEER and against SPEER's current Attorney, Steven Zwick, and against Zwick's associate attorney, James Alquist. Mr. Weiss' Cross Complaint stems from a Complaint filed against him by Steven Speer wherein Mr. Speer

alleges Breach of Contract and Breach of Fiduciary Duty as to Mr. Weiss. Weiss had represented Speer in a case involving employment discrimination.

Speer's Complaint against Weiss alleges that Weiss grossly over billed Speer for Weiss' services and performed unnecessary services all for the purpose of incurring more attorneys' fees.

In February of 2007, Speer had contacted Attorney Zwick, Cross-Defendant herein, because Speer had lost confidence in Weiss and because Speer had a strong suspicion that Weiss was not properly handling Speer's case and was over billing Speer. Zwick had Speer's billings reviewed by an attorney who practices Employment Law because Employment was the gravamen of the lawsuit for which Weiss was representing Speer. Speer's suspicions were confirmed; that Weiss was over billing Speer and was billing for services not performed and was performing unnecessary services for the purpose of incurring more attorneys' fees. Zwick filed a lawsuit on behalf of Speer against Weiss for Breach of Contract and for Breach of Fiduciary Duty.

After a series of Demurrers by Weiss, Weiss eventually answered the Complaint and served a Cross Complaint alleging interference with economic relations and fraud against Speer, Zwick, and Alquist on or about May 9, 2008. Weiss' Cross Complaint is essentially a retaliation for the Complaint filed by Speer against Weiss.

Weiss' Cross Complaint arises from an act of Cross-Defendants Speer, Zwick, and Alquist in furtherance of Speer, Zwick, and Alquist's right of petition of free speech under the United States or California Constitution and are therefore subject to a special motion to strike, Cal. Civ. Proc. Code § 425.16(b), (Slapp Motion). Therefore, Speer, Zwick, and Alquist requested that the Trial Court strike portions of Weiss' Cross Complaint.

Weiss' Cross Complaint contains a Cause of Action for Interference with economic relation wherein he alleges that Zwick intentionally interfered with the Attorney-Client contract between Speer and Weiss by falsely saying that Weiss grossly over billed Speer. Weiss' Cross Complaint also alleges that Speer instructed Weiss to dismiss all his lawsuits and that Weiss therefore lost all existing as well as potentially recoverable attorneys' fees.

Weiss goes on to say in his Cross Complaint that Zwick induced Speer to fail to pay his attorneys' bills and therefore interfered with the economic relationship between Speer and Weiss.

Weiss' Cross Complaint also contains a cause of action for Fraud wherein he alleges basically the same thing as in the cause of action for interference with economic relation except that Zwick's assertion that Weiss was over charging Speer was not true, that Zwick had made no factual investigation, and that Zwick knew that these allegations against Weiss were false.

Weiss makes a claim for Exemplary Damages in his Cross Complaint claiming that Speer and Zwick's conduct arose from hatred and ill will towards Weiss and a desire to oppress him and with the wrongful intention of injuring him.

Cross Defendant's Motion to Strike (Anti-Slapp) asserts that Speer and Zwick are protected by the litigation privilege because Speer had every right to seek counsel if Speer believed that he was not being represented properly by Weiss. The Trial Court sustained the Anti-Slapp motion.

ARGUMENT

I

WEISS' CROSS COMPLAINT WAS A PROPER SUBJECT TO A SPECIAL MOTION TO STRIKE

A Complaint or Cross Complaint is subject to a special motion to strike if it "aris[es] from any act . . . in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." Cal. Civ. Proc. Code § 425.16(b)(1). By its terms, the statue "shall be construed broadly." Cal. Civ. Proc. Code § 425.16(a). The party subject to the Slapp lawsuit bears the initial, prima facie, burden of showing that the law applies. *Equilon Enter., LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67, 124 Cal.Rptr. 2d 507, 518 (2002). That burden is met by showing

that the Slapp complaint arises from activity specified by subsection (e) which defines an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue." *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal.4th 1106, 1113 (1999). For the purposes of this motion, only section (e)(2) applies: "(2) *any written or oral statement* or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;" Cal. Civ. Proc. Code § 425.16(e)(2).

Under (e)(2), **all activity protected by the litigation privilege, Cal. Civ. Proc. Code § 47(b), including activity in anticipation of litigation, is necessarily protected by the Anti-Slapp Statute:** "[J]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code § 47, subdivision (b), . . . such statements are equally entitled to the benefits of *section 425.16.*" *"Briggs*, 19 Cal.4th at 1115, 81 Cal.Rptr. 2d at 476 (*quoting Dove Audio v. Rosenfeld, Meyer & Susman*, 47 Cal.App.4th 777, 784, 54 Cal.Rptr. 2d 830, 835 (1996)). Moreover, if there is an 'official proceeding,' there is no further requirement that the statement be regarding a 'public issue.' When there is an official proceeding, there is a public issue." *Briggs*, 19 Cal.4th at 1117, 81 Cal.Rptr. 2d at 477.

Once the initial burden of showing the statute applies is met, the burden shifts to the party who filed the complaint (here, Cross-Complainant Weiss, Petitioner herein) to show a probability of prevailing on the merits. *Equilon*, 29 Cal.4th at 67, 124 Cal.Rptr. 2d at 518. Numerous cases have held that when the litigation privilege applies to the activity complained of, that burden cannot be met as a matter of law. See infra.

A. THE STATUTE APPLIES UNDER SUBSECTION (e)(2).

1. Speer's lawsuit against Weiss is Absolutely Privileged under Cal. Civ. Code § 47(b).

Speer's filing of his complaint for Breach of Contract and Breach of Fiduciary Duty against his former attorney, Michael Weiss, is absolutely privileged under Cal. Civ. Code §§ 47(b) and (c). The "litigation privilege" of Cal. Civ. Code § 47(b) "applies to any communication (1) made in judicial or quasi judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal.3d 205, 212, 266 Cal.Rptr. 638, 642 (1990).

Moreover, "for well over a century, communications with 'some relation' to judicial proceedings have been absolutely immune from liability," and "it is late in the day to contend that communications with 'some relation' to an anticipated lawsuit are not

within the privilege." *Rubin v. Green,* 4 Cal.4th 1187, 1193-94, 17 Cal.Rptr. 2d 828, 831-32 (1993). **The privilege applies to "'preliminary conversations and interviews' related to contemplated action,"** *id.* at 1194-95, 17 Cal.Rptr. 2d at 832 (*quoting Ascherman v. Natanson*, 23 Cal.App.3d 861, 865, 100 Cal.Rptr. 656, 659 (1972)), and the privilege "is in no way affected by the presence of malice." *Ascherman*, 23 Cal.App.3d at 864-65, 100 Cal.Rptr. at 659. Thus, both Speer, Zwick, and Alquist are protected by the privilege.

Weiss' Cross Complaint for Interference with economic relations and fraud seeks to retaliate against Speer and Zwick for filing a complaint to seek damages against Weiss, Speer's former attorney. Speer and Zwick are absolutely privileged to file such an action and no lawsuit short of a malicious prosecution action may result therefrom.

B. WEISS CANNOT POSSIBLY MEET HIS BURDEN.

Speer and Zwick (and Zwick's Associate Alquist) have met their burden of demonstrating that the acts alleged in the cross complaint fall under protected litigation activity and the privilege set forth in Cal. Civ. Proc. § 47(c). The burden is now upon Weiss to show that there is a probability that he will prevail on his claim – not a mere possibility but a probability. Cal. Civ. Proc. Code § 425.16(b), *Equilon*, 29 Cal.4th at 67, 124 Cal.Rptr. 2d at 518.

Because the alleged statements at issue were absolutely privileged, Weiss cannot possibly meet his burden. After the *Dove Audio* court determined that the Anti-Slapp statute applied because the statements were privileged, the court turned to the question of whether Plaintiff could "establish a probability of prevailing at trial." The court had an easy answer. "[Plaintiff] did not and cannot do so in this case. As we have explained, [defendant's] communications were absolutely privileged. . . ." *Dove Audio*, 47 Cal.App.4th 777 at 784, 785, 54 Cal.Rptr. 2d 830, 835 (1996). *See also Kashian v. Harriman*, 98 Cal.App.4th 892 (2002) (plaintiff cannot prevail on his two defamation claims because activities were privileged).

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: November 25, 2009

Respectfully submitted,

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